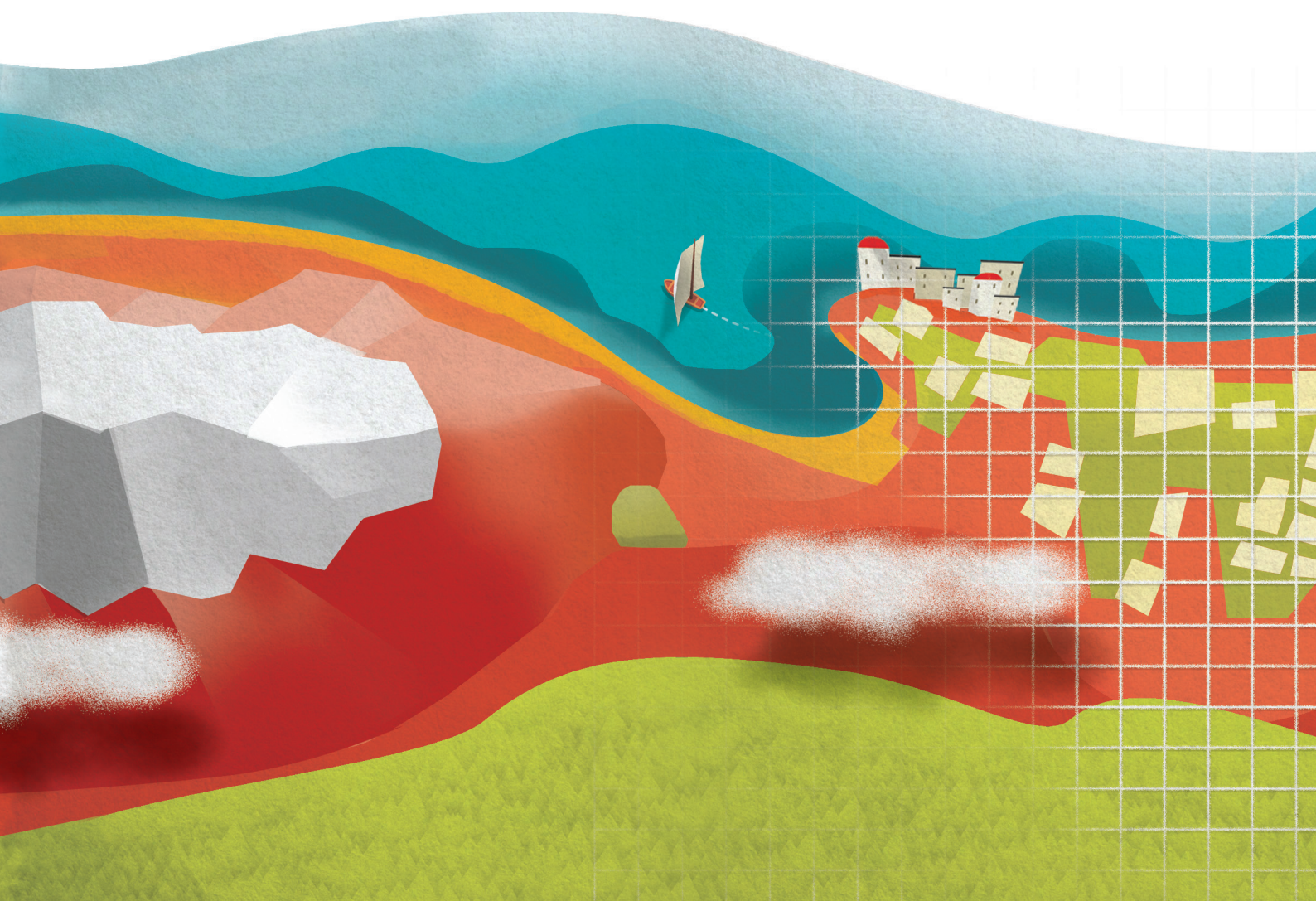




Creating a system to record tenure rights and first registration



The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors. They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: **www.fao.org/nr/tenure**

Creating a system to record tenure rights and first registration

This publication is intended to support the use of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of States in their implementation.

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Preface

On 11 May 2012, the Committee on World Food Security endorsed the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (the Guidelines). By promoting secure tenure rights and equitable access to land, fisheries and forests, the Guidelines aim to contribute to the global and national efforts towards the eradication of hunger and poverty.

The first general principle of the Guidelines is for states to recognize and respect all legitimate tenure right holders and their rights. It calls on states to take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not. Recording tenure rights, such as through registration, cadastre and licensing systems, can be an important way to recognize and safeguard those rights.

This guide addresses the recording of tenure rights with the particular focus on creating a new system to record rights and recording rights in a system for the first time. While recording systems exist around the world, there are often cases where people are not currently served by systems to record their tenure rights. This guide addresses the cases where the most appropriate approach is to create a new system to record those rights, and it provides practical advice on how rights can be recorded for the first time.

This guide is accompanied by another guide that focuses on a different aspect of recording tenure rights: improving existing ways to record rights ([Improving ways to record tenure rights](#)).

As these two guides cover different aspects of recording rights, they can be read as standalone documents, and as such, they have some text in common. However, some readers may benefit from reading both guides.

These two guides on different aspects of recording rights are part of a series of technical guides that offer advice on various aspects of improving governance of tenure, consistent with the Guidelines.

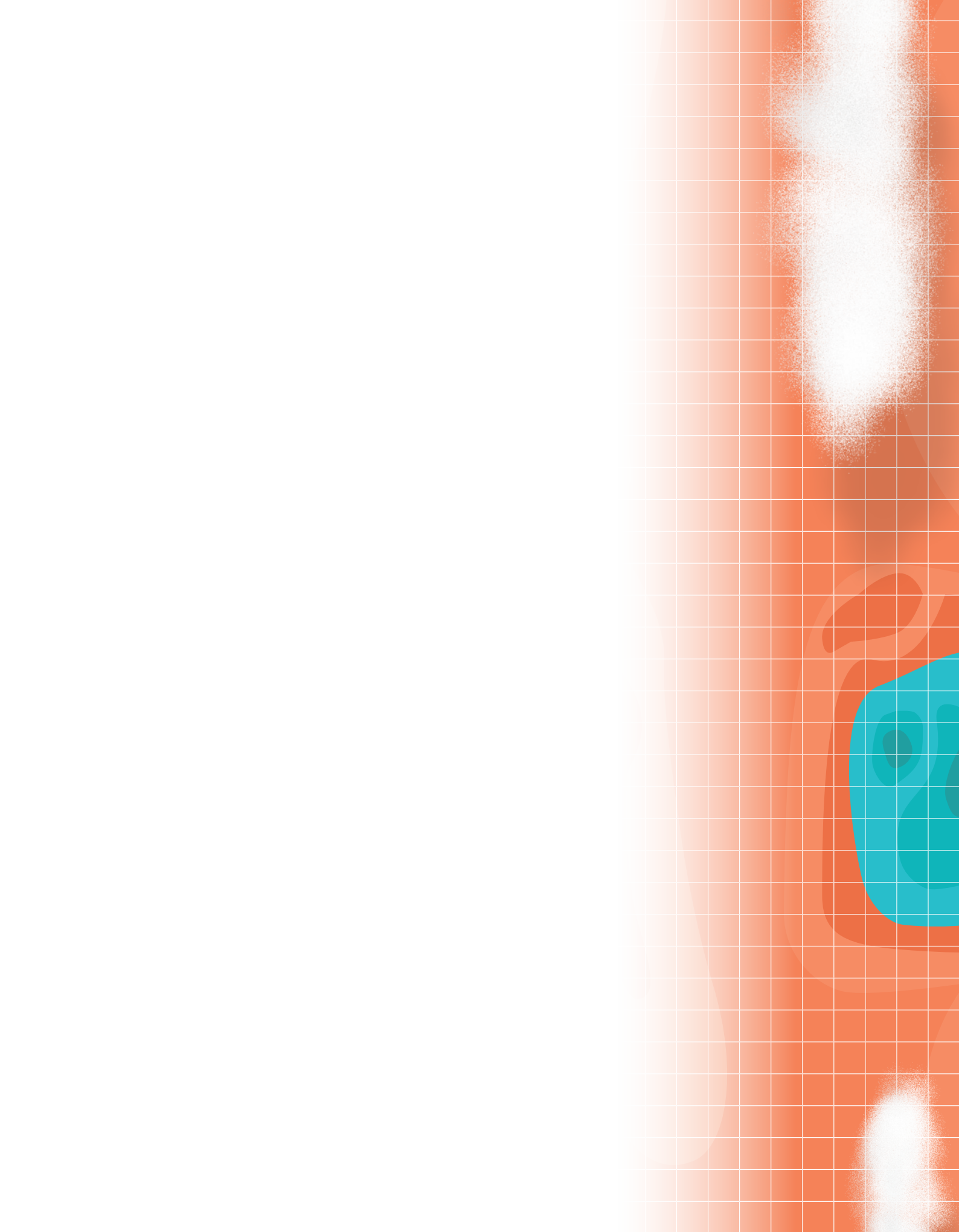
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This guide is about extending the recording or registration of tenure rights to people who currently are not served by systems to record their rights. It provides practical advice on ways to introduce a new system to record tenure rights and how the state can record rights for the first time, a process that is sometimes called first registration.

In providing this advice, this guide reflects the internationally recognized principles and practices of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (the Guidelines). See [*Recording rights, the Guidelines and this guide*](#) in this chapter.

This chapter outlines the need for such advice, describes what is covered in the guide, and shows how it can be used and by whom.

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Improving ways to record tenure rights: the sustainable management of recording systems

1. ABOUT THIS GUIDE

A NEED FOR THE GUIDE

Tenure systems are created by societies to define and regulate how people, as individuals or in association with others (including as families, communities, non-profit organizations, business enterprises and governments), gain access to land, fisheries, forests and other natural resources. Tenure systems determine who can use which resources, for how long and under what conditions. Tenure rights are the principal way in which people, the resources and the conditions of use are connected.

In some societies, information on rights is not documented as oral traditions are used to maintain the knowledge of who holds which rights and any related obligations. People in isolated communities, where the affairs of everyone are known to all, may feel no need for documented evidence of their rights.

The need for documented evidence becomes important as those rights become of increasing interest to others, particularly to those outside the community, including the government. State-held public records of who holds tenure rights for which resources and under what conditions, can bring benefits to individuals and society. These benefits include increased tenure security and facilitation of transparent markets for transferring rights, as well as support for broader economic and social well-being and a range of administrative services (see [Benefits of recording rights](#) in chapter 2).

Increasingly, attention is being paid to recording tenure rights that are not yet recorded; for example, in cases where customary rights have recently been given legal recognition, where new legally-recognized rights have been created based on informal rights, or where new fisheries rights, forest rights and water rights have been created or given legal recognition. These previously unrecorded rights could be recorded in an existing system (sometimes called a land registration system, deeds system, title system or cadastre) through

a process that is often called first registration. In other cases, it might be more appropriate to create a new recording system with a specific focus, such as for recording forest use rights, fisheries shares or water use rights, or to have the recording done at an appropriate level of government or by a self-governing community. The option of creating a new system for recording rights is the focus of this guide.

There is no point in creating a new system or recording rights for the first time if the system is not maintained. Maintenance needs to start while the system is being introduced and the rights are being recorded for the first time. A system must deliver services on a continual basis; these services must be of the appropriate quality and be delivered at the time and place needed and at costs that are affordable. These topics are beyond the scope of this guide but they are addressed in a companion guide on improving ways to record tenure rights. That document addresses the topics in the context of improving an existing system but it can also be relevant to the design of a new system. (See [Improving ways to record tenure rights: the sustainable management of recording systems](#) in this chapter for an overview of the contents of the companion guide).

INTENDED READERS OF THE GUIDE

This guide is aimed at people who are responsible for introducing a system to record rights or for the recording of rights in a system for the first time. As such, it is assumed that the readers have some knowledge of the recording of rights. While this target audience has a single definition, it comprises people who have different responsibilities (e.g. technical operations, management, regulations and law), and who are drawn from different sectors (e.g. public and private sectors) and different backgrounds (e.g. legal, surveying and information and communication technology (ICT)). It is also recognized that readers may understand various aspects of recording rights differently because of differences between their countries.

In addition, a range of people who interact with a system may find the guide to be useful, as it may help them to participate in the design of a recording system and in first registration. These people may include right holders and their associations (e.g. property owners associations, user associations), professionals (e.g. lawyers, notaries, surveyors, real estate agents), banks and other lenders, academics, civil society and non-profit organizations (e.g. those working to aid the poor or protect the environment), the courts, and managers and staff of other agencies responsible for the administration of tenure. The guide may also be useful for people in public administration, local government bodies, tax authorities and agencies responsible for infrastructure development, and for matters of privacy and access to public records.

MATTERS COVERED IN THE GUIDE

The guide provides general advice on ways to introduce a new system to record rights and for recording rights for the first time.

- ◆ Chapter 2 places the recording of rights in the context of a state's wider policies, objectives and ambitions as well as its legal, social and economic environment, and it identifies the stakeholders who may become involved with the recording of rights. The chapter presents some of the benefits of recording rights, but it also asks if recording systems are needed everywhere and if all rights should be recorded.
- ◆ Chapter 3 presents considerations for identifying the nature of the right (the right to do what, when and how), the person who holds the right, and the location (the parcel) where the right can be enjoyed.
- ◆ Chapter 4 looks at options for first registration, which is the process for identifying and entering information on rights, holders and parcels in the recording system for the first time.
- ◆ Chapter 5 addresses some design considerations for a recording system and reviews the institutional arrangements, the choices that are available for the way in which the system should operate, the functions and qualifications of registrars, the examination of information before it is recorded, the organization and storage of records, and the balance between public access to information and the privacy of individuals. (Other issues relevant for the design are covered in the companion guide on Improving ways to record tenure rights. They include: development of a customer focus, design of offices, management arrangements, staffing, reducing opportunities for fraud, mistakes and disputes, and the introduction of ICT).
- ◆ Chapter 6 focuses on the policy and legal aspects relating to the registry and its operations, and reviews the policy and legal frameworks that set the environment in which a registry operates, as well as the broader tenure environment.
- ◆ Chapter 7 recognizes that the context of recording rights is constantly changing and it provides a brief look at developments that are likely to have an impact on the recording of rights in the near future.
- ◆ Finally, the annex highlights areas of the Guidelines that are relevant to recording rights as an aid to reading them, but the annex is not a substitute for the Guidelines.

This guide is a relatively concise description of ways to improve the recording of rights. It is not an encyclopaedia that attempts to provide an exhaustive treatment. Nor is it a manual: it does not provide detailed step-by-step guidance as such steps would be useful only if placed within the context of the specific legal and administrative systems of a particular state.

For this guide, the recording of rights is about the official records of rights. It does not specifically address the recording of rights in oral-based knowledge systems. However, the newly created document-based recording systems may need to interact with rights held in such oral-based knowledge systems or at least be aware of those rights.

This guide does not specifically cover reforms to improve rights themselves. Some rights can be considered to be weak; for example, some women and minorities hold limited forms of rights and by simply recording such weak rights the livelihoods of the people who hold them may not significantly improve. In such cases, it is important to change the tenure system in order to increase the quantity and quality of the rights. However, such reforms to strengthen rights are beyond the scope of this guide (see [Are recording systems needed everywhere and should all rights be recorded?](#) in chapter 2).

While the main focus of this guide is on rights, these rights often come with obligations, such as the duty to maintain the relevant resources in good condition, to pay taxes and to respect the rights of neighbours and other right holders to the same parcel. Although this guide does not refer frequently to obligations and duties, they are implied when discussing rights.

The complexity and variations in recording systems around the world complicate discussions on improving the recording of tenure rights. Accommodating this diversity in a precise way would require terms to become lengthy and would make the text difficult to read. Some simplifications have been introduced in this guide to improve readability:

STATES

The places in which recording systems operate

Some systems operate nationally while others operate within jurisdictions, such as provinces, states or other autonomous regions. This guide uses the term “states” to cover all these jurisdictions, whether national or subnational.

RECORDING

The recognition of records associated with tenure rights

Consistent with the Guidelines, the term “recording of rights” is used. It applies to the registration of rights in states where the term “registration” is used.

RECORDING SYSTEM

The system that records tenure rights

Systems for recording rights are often referred to in different ways in different states; for example, land registration systems and cadastral systems. Consistent with the Guidelines, the term “recording system” is used to cover all types of these systems.

REGISTRY

The organization that operates the recording system

In some states, the records on rights and the records on parcels are managed by a single agency. For such states, the term “registry” refers to such single agencies. In other states, where a “dual agency” model exists, one agency is responsible for the records on rights and another is responsible for the records on parcels. For such states, the term “registry” is used to apply to both agencies as appropriate.

PARCEL

The area to which tenure rights apply

The Guidelines refer to parcels, holdings and other spatial units, recognizing that in certain contexts terms other than a parcel can be more appropriate. To simplify this text, the term “parcel” is used but it should be understood to also cover other spatial units where appropriate. As a further simplification, the term parcel includes any buildings or other constructions that might be erected within the parcel.

PEOPLE

The holders of tenure rights

A wide range of people and organizations can hold rights, either individually or jointly. They can hold the rights as natural persons (human beings) or as legal or juridical persons (business enterprises, associations, governments, traditional authorities, etc.). This guide uses the term “people” to refer to both natural and legal/juridical persons. It covers owners as well as people who hold other tenure rights to the parcel.

CUSTOMERS

The people who use the registry’s services

There are many people who use the information and services of a registry, both within the public sector (ministries, agencies, etc.) and in the private sector (individuals, companies, associations, banks, etc.). This guide uses the term “customers” to refer to people who use the registry.

PROFESSIONALS

The specialists outside the registry who provide services to customers

Customers are often assisted by trained and licensed specialists who provide advice and prepare documents for recording. These specialists can include lawyers, notaries, surveyors and real estate agents. This guide uses the term “professionals” to refer to such specialists who assist customers in dealing with the registry.

RECORDING RIGHTS, THE GUIDELINES AND THIS GUIDE

Guidance on systems to record tenure rights is provided by the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, which were officially endorsed in May 2012 by the Committee on World Food Security (see <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>).

Recording rights is prominently addressed in the Guidelines because it has a great deal to offer in establishing and ensuring tenure security, particularly for the most vulnerable in a society. The first of its general principles advocates that states “should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not” (see Guidelines 3A).

More specifically, the Guidelines address recording in section 17, which opens with the following statement:

States should provide systems (such as registration, cadastre and licensing systems) to record individual and collective tenure rights in order to improve security of tenure rights, including those held by the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems; and for the functioning of local societies and of markets.

The paragraph goes on to say:

Such systems should record, maintain and publicize tenure rights and duties, including who holds those rights and duties, and the parcels or holdings of land, fisheries or forests to which the rights and duties relate.

The Guidelines are based on a global process of consultation and were finalized through negotiations by governments representing different economic, social, cultural, religious and environmental views, and with the participation of civil society and the private sector. They thus represent an unprecedented international consensus on principles and practices.

The objective of the Guidelines is to improve governance of tenure of land, fisheries and forests for the benefit of all, with an emphasis on vulnerable and marginalized people (see Guidelines paragraph 1.1). The ten principles of implementation direct that states and others adopt such approaches as respect for human dignity, acting in a non-discriminatory and gender-equal way, consulting and engaging with stakeholders, applying the rule of law and ensuring accountability and transparency, and continually improving programmes, laws and other matters related to tenure. The annex to this guide identifies some of the recommended practices to improve the recording of rights

that are described in the Guidelines. The annex is intended to help with reading the Guidelines and is not a substitute for them.

This guide focuses on the contribution that effective recording systems can make to the governance of tenure for the benefit of all, including vulnerable and marginalized people who are often not well-served. In doing so, it reflects the Guidelines.

This guide is relevant to efforts to record land tenure rights, fisheries tenure rights or forest tenure rights, or indeed, other rights, such as water rights and mineral rights. The preface of the Guidelines, which was negotiated along with the Guidelines themselves, notes that states can take the governance of water and other natural resources into account when they implement the Guidelines.

This does not mean, for example, that fisheries tenure rights and land tenure rights should be necessarily recorded in the same system. It can be appropriate for different types of rights to be recorded in different systems. Where different types of rights are recorded in different systems, these systems should be linked through an integrated framework to allow for the sharing of information (see Guidelines paragraph 17.2). Doing so allows all rights (whether to land, fisheries or forests) to be identified and protected; for example, where there are proposals for expropriation by the state, investments by the private sector or responses to climate change. While this guide is relevant for systems to record rights for fisheries and forests, it draws heavily on the experiences of recording rights for land simply because of the longer history of land registration and cadastral systems and the large number of such systems that exist around the world.

This guide is relevant to the recording of a wide range of tenure rights, including public, private, communal, collective, indigenous and customary (see Guidelines paragraph 2.4), and those that are based on informal tenure (see Guidelines section 10). Much of this guide focuses on what is common to effective systems rather than on what is different about them.

Legitimate tenure rights

The Guidelines emphasize the recognition and protection of legitimate tenure rights. They do not define which rights are legitimate as the definition is likely to differ from one state to another. For example, there are situations where a state has not legally recognized customary tenure but where people use their customary rights every day. These rights can have a social legitimacy because they are recognized by the local community and others, even if they lack legal recognition. Other situations include people who use informal tenure rights that have emerged in informal settlements near urban areas, but where these rights have not been granted legal recognition.

The fact that the Guidelines mention a range of tenure rights, such as public, private, communal, collective, indigenous and customary, and also those that are based on informal tenure

indicates that these forms of tenure could all be considered legitimate tenure rights. However, not all tenure rights of a particular form might be regarded as legitimate. For example, a state might determine that rights in informal settlements will be regarded as being legitimate except for those rights of people who have settled in areas that are prone to frequent flooding or in areas of cultural importance (such as on archaeological sites).

The Guidelines establish a consultative and participatory process for identifying which rights are legitimate. The Guidelines say in paragraph 4.4 that:

Consistent with the principles of consultation and participation of these guidelines, states should define through widely publicized rules the categories of rights that are considered legitimate.

The principles on consultation and participation appear in paragraph 3.B.6:

Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Paragraph 4.4 also says:

Based on an examination of tenure rights in line with national law, states should provide legal recognition for legitimate tenure rights not currently protected by law.

The paragraph concludes with the statement that:

Policies and laws that ensure tenure rights should be non-discriminatory and gender sensitive. All forms of tenure should provide all persons with a degree of tenure security which guarantees legal protection against forced evictions that are inconsistent with states' existing obligations under national and international law, and against harassment and other threats.

For this guide, the rights being recorded are those legitimate rights that have already been granted legal recognition, as people tasked with recording rights should have clear instructions as to which rights can be recorded. The process of granting formal legal recognition to legitimate tenure rights that currently lack such recognition is a separate topic and beyond the scope of the guide (see [Are recording systems needed everywhere and should all rights be recorded?](#) in chapter 2).

Section 17 of the Guidelines

Section 17 focuses on recording rights, although there are various references in other parts of the document. Section 17 should be read in the context of the [General Principles](#) (see

Guidelines 3A) and the [Principles of Implementation](#) (see Guidelines 3B).

Paragraph 17.1 directs that recording systems to improve tenure security and the functioning of society and markets should be provided, and that the systems should cover individual and collective tenure rights that are held by the state and public sector, private sector, and indigenous peoples and other communities with customary tenure. The systems should record, maintain and publicize rights and duties, the people who hold them, and the parcels to which the tenure rights relate.

Paragraph 17.2 instructs that the systems should be appropriate for local conditions, including the human and financial resources that are available; that the system should record rights of indigenous peoples and other communities with customary tenure in a socio-culturally appropriate way; and that to ensure transparency and compatibility with other sources of information, recording systems should be included with other spatial information systems in an integrated framework. There should be the possibility to integrate records of all rights, whether they are held by the state and public sector, private sector and indigenous peoples and other communities with customary tenure. Where the rights of indigenous peoples and other communities with customary tenure, or occupations in informal settlements cannot be recorded, then care should be taken to prevent the recording of competing rights in those areas.

Paragraph 17.3 seeks the recording of everyone's rights without discrimination, and that agencies should provide service centres or mobile offices to improve access, especially with regard to vulnerable groups where this is appropriate. Further, locally-based professionals, such as lawyers, notaries, surveyors and social scientists, should be considered to help deliver information on rights to the public.

Paragraph 17.4 advocates that procedures should be simplified and locally-suitable technology should be used to reduce the time and costs for delivering services. It deals with technical matters, such as spatial accuracy, which should be applied in a way that is sufficient to meet local needs and, if required, could be improved over time. The records should be indexed by spatial units, as well as by holders, to allow competing rights to be identified. Information should be shared in accordance with national standards and include disaggregated data on rights, and such sharing should allow state agencies and local governments to improve their services.

Paragraph 17.5 provides for access to information, which should be easily available to all, although the sharing of information on rights should be subject to privacy restrictions, but these restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions. Finally, corruption should be prevented by publicizing the processes, requirements, fees and any exemptions, and deadlines for responses to requests for services.

IMPROVING WAYS TO RECORD TENURE RIGHTS: THE SUSTAINABLE MANAGEMENT OF RECORDING SYSTEMS

The recording of rights must serve a purpose and provide a value or benefit to the person who records a right. The design of a new system for recording rights should thus address how that system will be operated and maintained so that the records are kept up-to-date. The design should also consider the system's relationship to a much bigger framework that includes the rule of law and the protection of rights through an accessible and just court system, and the regulation of markets and financial institutions.

Immediately after rights have been recorded for the first time they can be transferred, such as in the cases of inheritance or sale, or in the subdivision of parcels. The information in the records will need to be updated to reflect these changes: the heirs will need to have the records updated, or alternatively a purchaser will have to take action if the rights are sold. There are many examples where the records and therefore the recording system have become outdated because people did not consider it worthwhile to have changes recorded. Once this happens, the value of the systems to support tenure security diminishes significantly. A basic test of a system is the extent to which people use it, the range of people who use it and the quality of their experience.

A companion guide on [Improving ways to record tenure rights](#) addresses the questions of how systems can deliver services of the appropriate quality, at the time and place needed, at costs that are affordable, and on a continual basis. Matters covered include:

Customer focus: ensuring that a focus on customers is at the centre of the design of systems by developing service standards; providing information to customers and seeking their opinions; addressing the needs of women, special groups and the vulnerable and marginalized; facilitating the provision of legal aid; and making processes efficient to reduce the burden on customers.

Offices: providing easy access to offices, including through sharing space with other agencies and using mobile offices, and designing the offices so they are effective for both customers and staff.

Management: ensuring appropriate governance arrangements; introducing strategic plans and business plans and monitoring performance; placing the operations on a stable financial basis; and continually improving the way in which things are done.

Staff: introducing a human resource policy and code of conduct and ethics; and ensuring that staff receive the training they need to perform well.

Fraud, mistakes and disputes: improving the quality of records by reducing the risk of fraud and mistakes, including through a procedures manual; establishing a compensation fund; introducing effective ways to deal with customers who object to a registry's decision (such as not to record a transaction); and using standard forms.

ICT: introducing ICT solutions to improve customer service (by allowing information to be retrieved and used more quickly and without having to visit the registry) while addressing the associated risks.

Tenure exists in all parts of the world and is embedded in a society's social, economic and political frameworks. Tenure rights allow people to use natural resources. Recording tenure rights is not an end in itself; rather, it exists to benefit particular individuals and groups as well as the broader society.

This chapter places the recording of rights in the context of a state's wider policies, objectives and ambitions and also its legal, social and economic environment, and it identifies the stakeholders who may become involved with the recording of rights.

The chapter presents some of the benefits of recording rights, but it also asks if recording systems are needed everywhere and if all rights should be recorded.

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Benefits of recording rights

2. THE CONTEXT FOR RECORDING TENURE RIGHTS

Key points of this chapter

- ◆ Recording of rights is not an isolated activity. Instead, it fits closely within a state's broader social, economic and political context.
- ◆ Recording of rights can be an important means of protecting the rights of people, including those who are marginalized and vulnerable.
- ◆ The benefits of recording rights can include improved economic and social well-being and cohesion, plus a wide range of administrative activities aimed at better management of natural resources, dealing with climate change, and conservation and environmental protection.
- ◆ Government policy in the areas of tenure, economic activity, climate change, social reform and other areas can be supported by a well-functioning recording system.
- ◆ Each state needs to determine the most appropriate recording system for its own needs and circumstances.
- ◆ Numerous stakeholders within government, the professions, academia, civil society and the private sector have a role to play in a system to record rights.
- ◆ Systems to record rights should be introduced only if they are sustainable. If the costs of recording rights are greater than the benefits of doing so, people will not record subsequent transactions. The information will quickly become out-of-date and the resources used to create the system will be wasted.
- ◆ Caution in recording rights needs to be exercised where the recording may jeopardize the rights of others, such as where restitution is underway, rights are rapidly evolving, rights need to be upgraded and rights are variable.

RECORDING AND THE BROADER SOCIAL, ECONOMIC AND POLITICAL CONTEXT

The recording of rights is usually an integral part of delivering or fulfilling a state's wider policies, objectives and ambitions. Those policies, objectives and ambitions might, for example, concern broad questions such as the nature of the economy and society, or how people fit within their environment in a sustainable manner. They might concern more specific issues, such as how land, fisheries and forestry resources can best be managed, or they might be about responsible public administration. The recording system is, thus, a part of a wider set of systems dealing with the management, protection, allocation, trading and taxing of rights.

Recording systems should exist to bring benefits to people, the broader society and government (see [Benefits of recording rights](#) in this chapter). A registry can play an important role in providing information on rights, the people who hold them and the related parcels for the planning, delivery and monitoring of many policies, objectives and ambitions such as:

- ◆ safeguarding the legitimate tenure rights of all holders without discrimination;
- ◆ taxation;
- ◆ economic and social planning and decision-making;
- ◆ natural resource management, agricultural development (including subsidies), state land administration, spatial planning and environmental protection;
- ◆ climate change and resilience;
- ◆ allocation of rights to public land, fisheries and forests;
- ◆ redistributive reforms, including programmes to improve the situation of groups such as the poor, women, and marginalized and vulnerable people;
- ◆ expropriation for infrastructure and other public development;
- ◆ trading, mortgaging and valuation of rights; and
- ◆ dispute resolution, court proceedings, bankruptcy and criminal proceedings.

The recording of rights, and obligations as appropriate, can be applied in any legal system that recognizes the existence of separate rights and obligations regarding natural resources. Effectively, this means that recording can be relevant practically everywhere, although it might not be needed everywhere (see [Are recording systems needed everywhere and should all rights be recorded?](#) in this chapter). The design possibilities of recording systems are not fixed, so it is open to any state to develop ways of recording new or different categories of rights, as illustrated by the development of registries of fisheries rights, catch rights and boats, and

more recently of water rights. Further, existing concepts, such as condominium or strata ownership, can be modified to meet the need to record rights that do not neatly fit into the standard model of registration (see [Forms of ownership and how they influence other rights](#) in chapter 3).

Recording has a long history in Europe and in many of the states that inherited European legal and administrative systems. Special care needs to be taken when recording rights in different settings. It is a common complaint that imposing a European legal system's concepts on an indigenous or customary system can easily disadvantage or even terminate the entitlements of the people who hold rights. Such tenure systems often have a social safety net in addition to rights of use and control. To avoid this situation, a thorough analysis of the nature of existing rights and obligations, and an assessment of whether they can adequately fit within an existing model, must be undertaken in order to introduce an appropriate socio-cultural recording system (see Guidelines paragraph 17.2).

Recording systems can fit within a variety of social and economic settings. While every setting may not require a recording system, the recording of rights can be flexible enough to be adapted to various social and economic situations, and creative responses to different needs are to be encouraged. Particularly, as new means of delivering services (such as mobile offices) become popular, services can be provided to a broader range of people who live outside the main urban centres. Assistance by staff of the registry, non-governmental organizations (NGOs) or other entities can deal with such concerns as low literacy levels and languages of minority groups.

STAKEHOLDERS CONCERNED WITH RECORDING RIGHTS

Institutionally, the recording of rights fits within the broader context of tenure and the administration of rights, and a registry will need to deal with many other bodies. The Guidelines make it clear that there are a multitude of stakeholders in tenure security ranging from the various arms of the government (legislature, judiciary and executive, including implementing agencies of the executive) through non-state actors such as businesses and professionals, and others such as academics and local and international civil society organizations. In developing and using the recording system, all such stakeholders have a role to play, as the following table illustrates.

STAKEHOLDER	ROLE
Registry	To establish and maintain a set of records of rights, holders and parcels, to provide this information to customers, and to record changes as they are presented by customers.
Customers	To use and benefit from the services of the registry, to give feedback and comments.
Executive and policy-makers	To create the registry, to provide the resources needed to establish and operate the registry (premises, staff, equipment, licences, etc.), and to adopt and issue regulations, by-laws and other implementing regulatory instruments.
Legislature	To adopt the legal framework, and to routinely adopt amendments and new laws to support tenure security and the adoption of new approaches.
Judiciary	To interpret the legal framework and uphold basic principles of tenure security.
Agencies that administer natural resources	To work with the registry to obtain information on rights and provide updated information.
Mapping agency	To provide aerial and satellite imagery and topographic mapping for use in the identification of parcels and to prepare parcel maps.
Infrastructure development agencies	To use registry information for identifying holders who will receive compensation for resources taken so that roads, ports, airports, hospitals, schools, water and electricity infrastructure, etc. can be constructed.
Anti-corruption agency	To provide general advice on anti-corruption measures, to train registry staff on best practice in fighting corruption and to provide advice as required on anti-corruption.
Agency responsible for ensuring privacy	To monitor the collection and publication of registry information to ensure that principles of privacy are balanced against the benefits of access to information and are consistent with national laws.
Professionals and their associations	To work with the registry to obtain and provide information, to develop standards, to prepare documents and plans that are used to update the registry's information and to hold conferences and workshops for the exchange of knowledge and experience.
Banks and other lenders	To use the registry information in decisions for granting loans and to safeguard their rights through the recording of mortgages.
Local and international civil society organizations	To work with the registry to improve customer services, to increase transparency and fight corruption, to obtain feedback from customers, and to ensure vulnerable and marginal people are represented and protected.
Academics	To research topics of relevance to the registry and its operations, including its legal framework, to provide expert advice, to train the next generation of managers and specialists, to share knowledge and experience at conferences, to provide evidence-based feedback on registry operations and impact, and to use the registry's records for other topics, such as genealogy.
Donors and international agencies	To provide technical advice, to fund recording activities, and to foster international cooperation and the sharing of experiences.

ARE RECORDING SYSTEMS NEEDED EVERYWHERE AND SHOULD ALL RIGHTS BE RECORDED?

Are recording systems needed everywhere? Should all rights be recorded? Can all rights be recorded in a sustainable way? These questions are relevant everywhere but they are receiving increasing attention where legal recognition has been given to rights such as customary rights, fisheries rights, forest rights and water rights.

Systems to record rights should be created only if they are sustainable. They are not an end in themselves. While they can bring value and benefits to government and broader society, they can function well only if they bring value and benefits to the people whose rights are recorded in the system. If people do not value the recording system, they will not use it and the initial investment to create the system and to carry out first registration will be lost. They are unlikely to use the system if the cost of recording rights is too high, the processes and procedures are too cumbersome, and the benefits are too limited. Systems are unlikely to be used where the value of parcels is lower than the recording costs (such as the time required to travel to a registry located in a distant city, the costs of professional services, and the fees and taxes for recording the transaction). In order for systems to function well and provide the needed services at affordable costs, they must be appropriately resourced, managed and staffed on a continuing basis.

While theoretically all forms of rights could be recorded, there are several cases where caution is advised. In particular, rights should not be recorded where doing so may jeopardize the rights of others. Examples of cases where caution is needed include:

Where restitution is required: The Guidelines provide a comprehensive treatment of the governance of tenure, and in section 14 they address the need, where appropriate, for restitution for the loss of legitimate rights to land, fisheries and forests. This responds to the fact that in a number of states, colonial and then independence laws and practices have dispossessed people from what is now considered to be rightfully theirs. Where rights to those areas have been allocated to others, requests to record those rights should be considered as part of the overall restitution programme. As paragraph 17.2 of the Guidelines notes, care should be taken to prevent the registration of competing rights to areas under customary tenure. A failure to do so could lead to further marginalization of already vulnerable individuals and groups. The restitution programme should adjudicate on the validity of the rights and the registry should reflect that outcome in its records.

Where rights are rapidly evolving: Concepts on rights have been undergoing transformation in some parts of the world, particularly with regard to fisheries and forests. Examples include the recognition of claims by indigenous peoples and local communities, the expansion of community forest regimes, and the privatization of resources and the devolution of responsibilities to communities. Various aspects of the associated rights may still be evolving and adapting to changing internal and external circumstances. Where rights evolve rapidly, they can bring out underlying conflicts (such as uncertainties over boundaries) that will need to be resolved. Without due care, people with previously recognized rights, as well as those with unrecognized rights, could be excluded from the process. A policy that allows for rights to be recorded prematurely could potentially restrict the process by locking in place inequitable outcomes.

Where rights should be upgraded: In many situations people hold weak rights. In some cases, the state owns the resources and allows people to use them through rights that can be easily withdrawn by the discretion of government officials. Holders who only receive weak rights are unlikely to invest substantial human and financial resources in developing their assets, and the recording of such rights by itself may do little to enhance tenure security. In other cases, women can hold weak rights because of discrimination in formal law and custom. The remedy is the strengthening of rights in terms of their quality and quantity, which should then be reflected in the records in the registry.

Where rights are highly variable: Rights that have considerable variability in time and space are difficult to define and record. For example, where nomadic pastoralists travel thousands of kilometres, following the rains to find grazing areas, their routes will differ from one year to another. The best recording systems in the world will be challenged to provide tenure security in such cases.

BENEFITS OF RECORDING RIGHTS

The recording of rights can bring benefits to people who hold the rights as well as to broader society. Potential benefits include:

Improved tenure security

One reason for recording rights is to prevent people from being excluded from the benefits of the legal recognition and protection of their rights. If people and communities wish to have their rights recorded, they should be given that opportunity. Recording of rights shows that rights have been acquired and they can help holders to get legal protection, particularly protection from those outside the community.

The public recording of rights can help to improve tenure security in two ways. First, tenure security improves where information on rights is easily available to all. If people do not know that a right exists, they can inadvertently do something that infringes on it. For example, if government officials do not know that people already hold legitimate tenure rights to an area, they can decide to reallocate that area for the use of other people, such as to those who have been displaced and need resettlement, or to investors who are looking to expand agricultural production. Where information on rights is not easily available, it can be easier for someone to acquire those rights illegally, such as through fraud. People are unable to object if they do not know that something wrong is happening.

Second, where systems provide legal recognition of rights, they open the way for legal protection of those rights. Where people have their rights and parcels recorded, they can get the benefits that are established by the law. If there are disputes, the records can be used in mediation or court to establish who holds the rights. The nature of legal protection that is provided depends on the legal framework for the recording system and so differs from one state to another. Chapter 5 describes variations in systems and in their protection.

The extent of the protection depends on the quality of the information of the system. The protection offered by a system is not worth much if people have little confidence in the integrity of its records. In general, the better the quality of the information in the system, the fewer problems are experienced, and the greater the level of protection that can be afforded to those whose rights are recorded.

Improved operation of markets

Markets, such as sale and lease, are important ways in which many people acquire access to natural resources. Recording systems can assist markets to operate by providing reliable information. In a transfer between strangers, the seller usually has better knowledge of the parcel and its associated rights. Where systems do not have good records, people will often transact only with people whom they know or are recommended by someone they trust. By providing reliable information, a system

makes it possible for a person to be satisfied that the seller has the right to sell. It reduces asymmetry of information between the parties in the transaction. In doing so, it introduces a level of institutional trust and transparency that allows strangers to conduct business with one another.

Recorded rights and parcels are a more attractive option for banks and credit bodies to lend money against because the creditors can be more certain of who holds the rights and of the characteristics of the parcel. Owners of recorded rights can find it easier to obtain a mortgage than owners of unrecorded rights. However, factors such as the potential borrower's ability to repay the loan (i.e. income) and the willingness to repay (i.e. credit history) are greater considerations to lenders than the existence of collateral in the form of recorded rights to parcels.

Improved economic and social well-being

People with secure rights to a parcel can feel more confident when leasing it to others, using it for a business, investing in it and making other improvements. As the largest capital asset in any state, efficient management and use of these assets can increase national wealth and benefit all income levels of society. Government bodies may be more likely to provide services to areas where rights are recognized. As people benefit from the services available, they are likely to feel socially secure and settled. Where people feel they have secure tenure, they are more likely to invest in improving their holdings, either for economic purposes or to improve their quality of life, such as through better quality housing.

Improved support for other administrative purposes

Recording systems provide information on parcels and rights for multiple purposes to citizens, governments and others. These systems form a key element of National Spatial Data Infrastructure, which allows information on tenure to be combined with information from other sources (see Guidelines paragraph 6.5). Records can be used for purposes as diverse as managing disaster and emergency situations to collecting annual property taxes in order to fund local services. They can also be used for expropriation for infrastructure and other public developments.

Improved environmental protection and conservation

If people are certain of their rights, they are more likely to take care of the resources and avoid destructive, short-term actions that result in erosion, soil degradation and loss of vegetation. Recording systems also provide useful information for government agencies responsible for managing the environment and dealing with climate change. For example, government agencies cannot design and enforce plans to protect sites with environmental or cultural significance unless they know who has authority over those resources.

Improved support in cases of emergencies

Reliable records, if safeguarded during natural disasters, provide a basis for reinstating or improving the conditions that existed prior to the disaster.

Recording rights requires information on three main elements:

- 1 the nature of the right (the right to do what, when and how);
- 2 the person who holds the right (or the people who do so); and
- 3 the location (the parcel) where the right can be enjoyed.

This chapter presents considerations for identifying rights, holders and parcels.

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3. RIGHTS, HOLDERS AND PARCELS

Key points of this chapter

- ◆ Tenure regulates how natural resources are used, by whom and under what conditions, and the range of rights continues to expand as a society's needs change.
- ◆ How ownership is perceived, and who is entitled to own land, fisheries, forests and water, place conditions on how other rights are viewed and understood. There are numerous forms of ownership, such as state ownership; private, individual ownership; and common and customary forms of ownership.
- ◆ Multiple rights can exist over the same parcel, and these can change over time. In recording rights, it is necessary to identify the nature of the right, the area over which it exists (the parcel), time limits (such as for leases) and any associated rights, such as the right to transfer the tenure right.
- ◆ Rights come with responsibilities and obligations, such as duties to pay tax and to maintain the resource. Restraints on the use of the resource can also exist for the benefit of neighbours and the community.
- ◆ Holders of rights, whether natural or legal persons, need to be identified. Special care needs to be used for spouses, children, multihousehold or multiholder situations, the illiterate, persons with disabilities and others.
- ◆ Public land, fisheries and forests present specific problems in identifying rights and right holders, so it is important to work closely with national and local level authorities.
- ◆ Parcels need to be identified, particularly in terms of their boundaries. The level of accuracy in defining boundaries should match the needs of the society and economy.

GENERAL CONSIDERATIONS

Tenure rights are the means by which people are able to use and enjoy land, fisheries, forests and other natural resources. Societies have developed rules of tenure that regulate these rights (such as to which resources) and how the rights are allocated, to whom and under what conditions (see [Forms of ownership and how they influence other rights](#) and [Rights](#) in this chapter). These rights typically come with restrictions and responsibilities (see [Obligations that come with rights](#) in this chapter).

Many rights exist, such as ownership through to various forms of use rights and usufruct. (A usufruct is often considered as an individualized right that is not an ownership right, but which allows a person, or people jointly, to use and enjoy the resources of a parcel). The types of rights that can exist are restricted only by the imagination. In the twentieth century several new types of rights emerged, for example:

- ♦ condominium rights, which provide for a mixed form of ownership, with individual ownership of units (e.g. apartments and offices) and common ownership of common areas (e.g. entrance, hallways, recreational areas, roofs);
- ♦ timeshare rights, which allow multiple parties to hold rights to a parcel (e.g. as with a condominium), with each party being allocated a period of time to use the parcel;
- ♦ development rights, which can be considered as a right to build a structure on the parcel or otherwise change the parcel. In some states, development rights can be sold separately from other rights, such as to a public agency in order to promote the conservation of agricultural and forest lands, and water bodies. The owner receives payment for the sale of the development right and continues to manage the farm or forest. The owner, and any successive owner, no longer has the right to convert the parcel to other uses.

Rights can be held by a wide range of people, organizations and governments (see [Right holders](#) in this chapter). People can hold rights as individuals, as legally-recognized married couples and as extended families. Organizations can include condominium and neighbourhood associations, communities, religious associations and business enterprises. Governments at central, regional and local levels can also hold rights.

A number of different types of rights can apply to a single parcel or to a portion of a parcel (see [Parcels](#) in this chapter). For this guide, a parcel is the physical space to which a right such as an ownership right or usufruct applies. It is the space where the owner or usufruct holder can exercise his or her right. A parcel can include natural resources as well as buildings or other constructions within the parcel.

As a result, it is possible for more than one person to hold rights to a parcel. One person can have rights to use the parcel (including for purposes as specific as grazing, growing crops, collecting firewood and catching fish). Another person can enjoy rights that allow control over the parcel (e.g. making decisions on how the parcel will be used or benefiting from the sale of crops, trees or fish). Someone else can hold the rights that allow the parcel to be transferred to another (e.g. the ability to allocate the parcel to others, including through sale, lease, transmission to heirs). These rights can be associated with a right to exclude others from using the parcel. Such multiple rights to a parcel are sometimes pictured as a bundle of rights, like a bundle of sticks, where it is possible for the various rights, represented by sticks, to be held by different people.

In all jurisdictions, rights exist that are created through law. Rights can originate in other ways, such as by custom (in the case of customary tenure rights) or informally (in the case of informal tenure rights that emerge spontaneously in informal settlements). Such customary or informal rights can have a social legitimacy even if they are not legally recognized. The Guidelines call for legitimate rights to be given legal recognition and protection where they currently lack these (see [Recording rights, the Guidelines and this guide](#) in chapter 1).

All rights, including those of private ownership, are limited in some way. For example, a person's rights are limited by those of other people, including neighbours. Governments usually have the power to limit the rights of people in a number of ways, such as through expropriation, spatial planning regulations and the safeguarding of national and public interests.

The clear identification of rights, holders and parcels can help to bring certainty. However, the identification of holders can be an opportunity for the powerful to influence the interpretation of the facts to the disadvantage of the poor and marginalized. Caution also needs to be taken when considering a programme to identify boundaries. Perhaps more frequently than might be appreciated, ambiguities and uncertainties are tolerated for the sake of social harmony. The identification of rights for official purposes can cause underlying conflicts to rise to the surface. While a clear description of boundaries can help to avoid or settle disputes between neighbours, sometimes the process of defining precise boundaries between parcels for the purpose of recording, causes arguments between neighbours who had previously lived happily together. There appears to be no known evidence of a correlation between the accuracy with which a boundary is surveyed and the number of boundary disputes: requiring high survey accuracies can increase the associated costs, but will not necessarily reduce the number of disputes.

FORMS OF OWNERSHIP AND HOW THEY INFLUENCE OTHER RIGHTS

A number of African states provide for a customary right that can be held individually or jointly, that is perpetual and heritable, and that can be transferred to others under certain conditions. While such a customary right may be approximately the same in different states, in some states it is regarded as an ownership right while in other states it is a usufruct (i.e. a right that is not an ownership right but which is often considered as an individualized right that allows a person, or people jointly, to use and enjoy the resources of a parcel). For example:

- ◆ In Uganda, such a right held by a member of a community is treated as customary ownership and it can be recognized in a Certificate of Customary Ownership.
- ◆ In the United Republic of Tanzania, such a right held by a member of a community is viewed as a usufruct, and can be recognized in a Certificate of Customary Right of Occupancy. The right cannot be treated as an ownership right because ownership of all land is held in trust by the President.
- ◆ In Ghana, such a right held by a member of a community is also viewed as a usufruct, and it can be recognized in a Certificate of Title. The right cannot be treated as an ownership right because the ownership of land is vested in the relevant ethnic groups, as represented by the stools, skins and families, on behalf of the members of these respective groups.

Thus, how ownership is perceived, and who is entitled to own land, fisheries, forests and water, place conditions on how other rights are viewed and understood.

Public ownership as the only legal type allowed in a state

In some states, all the land, fisheries, forests and other natural resources are publicly owned. Others who use the resources in these states have rights that are, by definition, not called ownership rights even if those rights are substantial.

In Tajikistan, for example, land is under the exclusive ownership of the state but people can be granted use rights that are of a lifelong duration and heritable. Other use rights can be allocated for shorter durations. Other states with public ownership of land, such as China, the Lao People's Democratic Republic and Uzbekistan also allow people to have some type of use right.

The United Republic of Tanzania provides an example of customary rights where resources are owned by the state. All land is held by the President as trustee for the people and cannot be owned privately. Instead, people can hold a

customary right of occupancy for village land: these rights can be held individually or jointly, are perpetual and heritable, and can be transferred to others subject to permission from the village council.

Multiple types of ownership allowed in a state

The majority of states allow different types of ownership to co-exist. One way to classify types of ownership is as private, customary or public ownership. In some states, religious endowments are seen as an additional form of ownership.

Private tenure and individual ownership: Private ownership is often characterized as being individualized and exclusive, and with all the rights to a parcel concentrated in the hands of a single party. However, this characterization oversimplifies what often exists in reality as it is possible for a number of people to hold rights to the same parcel. While private ownership can mean that the owner is able to enjoy the use of a parcel to the exclusion of others, it is possible for the owner to transfer various rights to others. For example, the owner can transfer a number of rights to a parcel through a lease, such as transferring to the lessee the right to use the parcel, the right to transfer the use to someone else through a sublease or the right to use the parcel for collateral. During the period of the lease, the owner is not able to use the parcel and usually has to request permission from the lessee in order to enter the parcel. At the end of the lease period, the rights revert to the owner who is, once again, in a position to use the parcel. Rights other than ownership can also include the rights to enter the parcel for a specific purpose (e.g. to install and maintain an electrical transmission line, to travel across the parcel, to use water from a well, to place a communication infrastructure); and rights to take something from the parcel (e.g. firewood, gravel, sand or peat).

As the example of a lease indicates, rights can be divided by time. In addition, rights can apply to different portions of the parcel. For example, a pipeline easement or servitude or a right of way for a driveway can be defined to be adjacent to a parcel boundary; these rights can be enjoyed only in that portion of the parcel and not elsewhere. Under such circumstances, the single parcel unit can be considered to be partitioned into separate portions, where parties other than the owner can hold rights to some portions of the parcel but not to others. Rights may also be held for the surface of the earth, the sub-surface and the air space (see [Parcels](#) in this chapter).

In some states, privately-owned rural parcels can be subject to historical and perpetual "rights to roam" that can be enjoyed by people other than the owners. These rights are often based on traditional rights of people to travel on foot, horse or skis across the land or forests owned by others. The rights come with restrictions (such as limiting access to certain portions of the parcel) and responsibilities (such as respecting the rights of the owners or not causing damage). Some states have codified these rights of access, while in other states, even in Europe (such as in Finland and the Sweden), these rights exist but are still largely undefined in written law.

Private tenure and common ownership: Condominium (or strata) ownership represents a type of private ownership that has elements of both individual and common ownership:

- ♦ The individual units (e.g. apartments, offices) of the condominium are owned separately from one another.
- ♦ The parcel where the condominium is built is owned by a corporate body on behalf of the owners of the individual units who are shareholders in the corporate body (although in some states the parcel can be owned by a party other than the owners of the individual units).
- ♦ The common space of buildings (such as entrances and hallways), recreational areas (such as tennis courts and swimming pools) and parking areas are owned by the corporate body.

In some cases a condominium is a single building that occupies the entire footprint of the parcel. In other cases, a condominium can have several detached buildings (each with individual units) on the parcel. As condominium buildings are often multiple stories, condominium rights can be defined in three dimensions. For example, a unit can be defined by the particular building in which it is located and the floor (or floors) of the building in which the unit exists.

The concept of a private community association has been extended to include developments referred to as “gated communities” where a large parcel has a number of individual houses, streets, recreational facilities, gardens, parking areas, etc. Within these developments, the individual houses, often each with a private garden area, are owned by individual parties, while the common areas are owned by a corporate body, sometimes called a homeowners’ association. As with conventional condominiums, the owners of the individual houses are shareholders in the corporate body. As a result, the parcel for the gated community can be considered to be partitioned into numerous separate portions, where some portions are for the exclusive use and enjoyment of the people who hold rights to those portions, and other portions can be used and enjoyed in common. In addition, others can hold rights in the form of easements and servitudes, mortgages, etc., in relation to the individually-owned houses and garden areas, and to the portions owned in common.

Customary tenure and common ownership: Customary ownership is often regarded as the collective right of a group, such as a community, to the resources that it has traditionally used. In Ghana, for example, landownership is vested in the relevant ethnic groups (as represented by the stools, skins and families) on behalf of the members of these respective groups.

In the case of indigenous peoples, the ownership of their land, territories and resources is recognized in the United Nations Declaration on the Rights of Indigenous Peoples (which also recognizes their rights, other than ownership, to lands, territories and resources that they have otherwise traditionally used and occupied).

As the community is the only party that can hold ownership rights, members of the community acquire individualized rights that are not ownership rights, and usufruct is sometimes used as a general term for these rights. For example, in Ghana, these usufruct rights can be held individually or jointly, are perpetual and heritable, and can be transferred to others under certain conditions. The usufruct rights that provide an individual person or family with certain exclusive rights to a particular area can be subject to a host of other customary rights, which the community can exercise in that area. For example, other community members can continue to have a right of way over that area; a right to water that is located within that area; a right to collect fuelwood or other non-timber forest products within that area; or a right to hunt in an uncultivated forest within that area. In grassland zones, the particular areas allocated to individuals or families can include common access to grazing areas. Sometimes it is not possible to define all rights of a community simply by reference to geographical location alone because of the unrestricted access by community members to natural resources and the particular nature of some rights; for example, a right to trees (or to their fruit) where the tree rights are independent of the rights to the land upon which the trees are located.

Where communities with customary tenure are recognized as the legal owners of the land and other natural resources on behalf of their members, the spatial area or areas owned collectively by such a community can be identified as a parcel or parcels. The identification of the parcels under the ownership of the communities can help them to protect their rights against encroachment or appropriation by others. Where members of a community hold exclusive usufruct rights to specific portions of the parcel, such as for residential or cultivation purposes, those portions could be identified on the parcel in a manner similar to that of condominiums and gated communities.

Customary tenure and individual ownership: Individual ownership under customary tenure is less common but has been recognized in some states. For example, Uganda provides for a certificate of customary ownership, which is based on the customary law recognition of a person as being the rightful owner of a parcel. Such customary ownership includes the right to sell the parcel and use it as collateral for a loan. Because the ownership is customary, customary law applies, including for

the need to obtain permission from the community in order to sell the parcel. In addition, the customary rights of others to the parcel continue to exist and are not extinguished by the issuance of the certificate. In Canada, the Nisga'a nation allows for individual members to have private ownership of portions of its tribal land.

Public ownership: In states that allow for multiple types of ownership, a distinction can be made regarding the public ownership of parcels that have a particular importance and cannot be transferred from the public domain (such as national parks and places of significant cultural heritage) and the ownership of parcels that the state, in effect, owns as a private party and can sell, even if the parcel is used for a public purpose (such as a school or hospital). In particular, states with a French legal tradition distinguish between resources in the public state domain and those in the private state domain. In general, private state lands can be sold while public state lands cannot, and to do so requires their prior conversion to private state lands. Exceptions exist, such as in Rwanda, where wetlands are categorized as private state land but their sale is prohibited for environmental protection purposes. Publicly-owned parcels can be allocated to others in a variety of ways, such as through leases for private exclusive use, or for authorized public use, such as for recreational purposes. In addition, governments can use parcels owned by others for public purposes, such as by leasing offices to provide services to the public.

Public ownership and customary tenure: Public ownership often results in legal designations, such as “forest lands”, even if the land is used under customary tenure. In some cases, customary tenure to land is legally recognized, but the trees on that land are under the control of the forestry agency. At times, the resource is not used solely according to the legal designation; for example, traditional pastures in many states exist on lands legally classified as forest lands. In practice, the situation is often one of overlapping rights, where pastoralists who have seasonal rights to use pastures, including in forested areas, coexist with people who have more permanent rights. The customary rights can often change to reflect changing circumstances. For example, markets have expanded into previously remote areas and this has sometimes resulted in a desire to produce forest products for the market. This, in turn, may require a renegotiation of rights with the state, as the owner, and lead to changes in the legal framework in order to give legal recognition to the new rights.

RIGHTS

The identification of rights should be based on the following considerations.

Identification of rights to be recorded

Registry staff are usually required to record rights that are defined in law: if the law on tenure rights changes, then the rights that can be recorded will also change. Recording systems can be dynamic and they have changed over time. All types of rights could be recorded if there is a need to do so, and if the costs of recording them are less than the benefits that arise. There is considerable variation in what can be recorded. For example, for land registration systems, lease rights can be recorded in some states but not in others; and in some states, certain types of lease rights (such as a lease for agricultural land) can be recorded but other leases (such as a lease for residential purposes) are not eligible for recording.

It is possible to record claims against the parcel, such as where the holder has not paid off debts. For example, the government might file a claim such as a lien for the failure to pay the taxes levied against the parcel, or a party who has been contracted to construct improvements to the parcel might file a lien if the holder does not pay for the work. Similar to a mortgage foreclosure, the party that files the lien can force the sale of the parcel in order to recover the money owing. Covenants, easements and servitudes can be recorded to inform people of those limitations to rights that can exist on a parcel.

Identification of rights that are regarded to be not capable of being recorded

It is common for some legally recognized rights not to be recorded, and some rights may not be capable of being recorded.

Rights defined in legislation: Some rights, including of ownership, are defined in legislation and do not necessarily appear in the recording system. For example, in some cases, the ownership of navigable river beds is held by the state, and courts or the legislature may determine whether a particular river is considered to be navigable or not. The ownership of minerals (particularly precious metals) by the state can also be defined in law. In jurisdictions where the state is the legal owner of all land and other natural resources, the fact of state ownership is typically defined in the constitution and there is no need to record the state's ownership in the recording system.

OBLIGATIONS THAT COME WITH THE RIGHTS

Pre-emption rights can also be defined in legislation. Such a right gives a person preference over others to acquire a parcel, and is sometimes referred to as a right of first refusal or an option to purchase. The pre-emption right becomes active when the owner wishes to sell. Legislation can define the categories of people and others with pre-emption rights and the order of priority; for example, co-owners, lessees, neighbouring farmers, other farmers, the community or local government, or the state.

Overriding rights: Some rights that apply to a parcel may not be capable of being recorded, as defined in laws or regulations. These rights “override” the recorded rights, so it is important that a buyer makes proper investigations before buying. For example, some states do not allow short-term leases to be recorded. In Ghana, for example, leases of less than three years cannot be recorded, while in England and Wales in the United Kingdom of Great Britain and Northern Ireland, leases of seven years or less are not recorded, nor are public rights of way, rights to support adjacent structures and rights to light. Rights that are “ripening” such as through adverse possession or prescription are also not capable of being recorded. In some states, even where spouses, live-in parents, minors and people with mental disabilities do not have recorded rights, they may retain a right to occupy a building on a parcel if that parcel is sold without their consent.

Information to be clarified where rights are identified

With any dealings on rights, the following should be clearly identified in order to avoid doubts and disputes at a later stage:

The nature of the right: What does the right enable the holder to do? The purpose of most legally recognized rights are clearly defined in the law. A few types of transactions (e.g. inheritances, sales, leases and mortgages) usually account for the vast majority of transactions that are recorded, and standard texts can be sufficient to describe what is being transferred. In other cases, the intention should be clearly expressed in the transaction document (perhaps with a plan attached), particularly where the right being transferred is unusual (e.g. the right to use a specific portion of a parcel for grazing at certain times). In addition, the rights to use the parcel will often be restricted through regulated spatial planning.

Spatial limitations to the right: Many rights cover the entire parcel but others can affect only a portion of the parcel. Common examples of rights that apply to only a portion of a parcel are rights of way and ►►

Rights typically come with some form of obligation, such as responsibilities and/or restraints. These responsibilities and restraints are increasingly being placed in the context of the growing recognition of the importance of the environment and of stewardship for natural resources.

Responsibilities: Rights can come with required responsibilities for the holder. These responsibilities can include paying taxes associated with the right, keeping public rights of way that cross the parcel free of obstructions, clearing undergrowth to reduce the risk of fires and jointly maintaining a common wall or fence with the neighbour. Many such responsibilities can be created through unwritten customary rules or through legislation that is not directly related to tenure, such as laws on fire protection, but which nonetheless specify the duties of landowners.

Restraints: The enjoyment of rights can be restricted in a number of ways. For example, negative easements and negative servitudes can prevent a person with rights on one parcel from constructing a building that blocks the view from the neighbouring parcel or blocks the light from reaching that parcel. (Easements and servitudes are considered negative where they provide someone with a right that prevents another person from doing something that would be legal on his or her parcel if the restriction did not exist. They are considered positive where they provide someone with the right to use another person’s parcel for a specific purpose). In some states, there are restrictions called “restrictive covenants” or “building schemes” that limit the holder’s freedom to build or garden. These covenants are adopted so that the entire community uses a consistent colour, design and garden theme. In customary tenure systems, communities can impose restrictions on how individuals can use common resources so as to sustain their use.

► other easements and servitudes, and communal rights over communal parcels. Such a right does not provide for the holder to have free range over the entire parcel.

Temporal limitations to the right: Ownership rights and some easements and servitudes often exist in perpetuity, i.e. they are not bound by a time limit. Other rights like leases are limited; they may exist for a fixed period of months or years, or up to a fixed date, or for an undefined period, but not to exceed a maximum defined period of time such as the life of a person (e.g. in the case of a life estate or a personal servitude).

The right to transfer the right: The right to transfer or alienate rights is most closely associated with ownership, but holders of other types of rights are often able to transfer rights. For example, a lessee may be able to sublease the parcel or sell the lease to another person, although permission from the owner to do so can be required. Lease rights and some types of usufruct rights can also be mortgaged and inherited by heirs. Rights of customary ownership and usufruct can be transferrable provided that permission to do so is granted by the community.

RIGHT HOLDERS

Right holders who are natural persons are usually identified by their full name, as given on their birth certificate, passport, identity card or change of name document. Where people do not have the required identification documents, alternative forms of identification, such as witness statements, may be needed.

In some states, it is sufficient to show the person's name in the register, particularly where there is no system of personal identification numbers, while in other states the personal identification number is included where it exists. In almost all cases, however, the registry's archive has documents that have details identifying the right holder, such as the home address, occupation, marital status, date of birth and parents' names.

There are a number of special cases regarding holders where particular steps need to be taken:

Spouses: In many states, the rights of spouses are addressed by the law. For example, in civil law, states and others, the law provides that any parcel acquired during the marriage belongs to both spouses, even if only one is recorded as the owner. Where there is a notary system, the notary must ensure that both spouses agree to a transaction, such as a sale of matrimonial parcel, whether or not both spouses are recorded as owners. However, where both spouses hold the right to the parcel, both should be recorded as the holder. If only one spouse comes forward during first registration and the other spouse is omitted from the records (see chapter 4), problems are likely to arise where only one spouse's

name appears on a subsequent transaction document because the registry will simply record the document presented to it, usually without asking many questions. Extra steps should be taken to make sure both spouses are on the record, such as by forms that have a specific question on the identification of both spouses. In some states, women, in particular, may lack official forms of identification and alternatives such as witness statements may be necessary.

Children: In most states, the rules for uniquely identifying adults (i.e. through birth certificates, identification cards) should be the same for children (i.e. people under the legal age limit, which is usually 18 years, particularly if the child is not married). In general, the laws of the state address matters such as the age of legal capacity, whether children can hold rights to a parcel by themselves without a trustee, and whether they can sell or make other transactions with parcels without a court order. It is important to look at the general laws on civil capacity, such as the civil code, and any particular laws and court decisions on the capacity of persons under the legal age limit to hold rights to a parcel and to enter into a transaction.

In some states, the fact that the holder is a child is recorded in the registry by explicitly identifying the person as a child and giving the date of birth. In this way, anyone who deals with the parcel will know that special rules could apply (such as restrictions in the law on the ability of children to sell, mortgage or lease parcels without court authorization). If the record does show that a child is the holder, and the law requires special authorization to deal with the parcel (such as by a court), the registry needs to make sure that any sale, mortgage, lease or other document is accompanied by evidence of that authorization. Once the child reaches the age of legal capacity, he or she can apply to have the record changed by deleting the reference to child and date of birth.

Special steps should be taken to ask whether there are any children involved. In some cases, the parents may not understand that all members of the family should be recorded as holders of rights, if the law provides for that. Where the children are orphans and are under the care of relatives, there could be risks that they are not identified as right holders, such as through inheritance from their deceased parents.

Multiple holders to the same parcel: In addition to the cases of spouses and children, it is common for more than one person to hold a right jointly to the same parcel. Where the concept of a share of each holder is relevant in the legal system, it is usual for the record to show the share of each holder. The registry can rely on this statement by the holders without further enquiry, although it should make sure that all the holders agree between themselves. Examples include:

- ◆ two or more people who have jointly acquired the rights to a parcel, for example by buying it;
- ◆ heirs, where there can be a number of children (or others) who inherit the parcel. In extreme cases, where a parcel has been passed down through several generations, there can be hundreds of people entitled as holders, as each has received a small share of his or her parents' share;
- ◆ associations and trusts, where trustees hold the rights to the parcel;
- ◆ apartment buildings where the building has not been legally divided, and each person holds a share in the whole building;
- ◆ timeshare resorts, where each person holds a small portion of the parcel, which entitles him or her to a few weeks of accommodation each year;
- ◆ leases in large shopping centres or markets, where there are dozens or even hundreds of separate shops;
- ◆ family lands, which can include the ownership of a parcel by an extended family;
- ◆ customary rights where the parcel is owned collectively by a group, and with individuals and households holding specific portions for their exclusive use and occupation.

Where there are many right holders, the registry must make a decision about how many to show on the register. Sometimes there is a limit of space in the register book or in the computer system, but even without a space limit, recording as many as several hundred names is a long and difficult task, and entering all the names is likely to result in mistakes. As a result, some registries place a limit on the number of names to be recorded. This can be due to the law, such as that in England and Wales in the United Kingdom of Great Britain and Northern Ireland where there is a limit of four owners, or in the Sri Lanka, where multiple owners must appoint a manager of the parcel who is legally entitled to be recorded.

Alternatively, the registry can impose its own limits administratively, simply requiring reference to another document in its archives that lists all names of right holders. For example, where the number of people holding rights exceeds the maximum number that can be recorded, the register should refer anyone looking at the record to the original document (such as an inheritance certificate or sale document) held in the archive, which lists all the holders, their identification and, against each name, the share that the person holds. In such a case, the register could simply say "refer to inheritance document number 12345678" in which shares could be indicated as follows: Mr A 1/6, Ms B 1/2, Ms C 1/6, Mr D 1/12 and Ms E 1/12, making a total of one. Shares can be expressed in percentages as well as fractions.

Illiterate people: There should be no problem recording illiterate people as holders of rights. They have the same rights and capacity as people who are literate, and they should have the same identification documents. The existing law should provide alternative forms of authorization for cases where illiterate people need to sign or otherwise authorize a transaction. Such forms could include allowing use of crosses instead of signatures on documents, fingerprint or biometric identification such as iris recognition, or allowing the testimony of third persons to confirm the identity of the person who holds the rights. Alternatively, the transaction could be conducted through a power of attorney or a court order.

Persons with disabilities: Care should be taken where any person, who might not be present due to incapacity or disability, is the holder or one of the holders of rights. There are sometimes special challenges involved in identifying people who cannot communicate or cannot sign, such as those who have suffered a stroke or have a physical or mental disability. The registry would not necessarily know that the holder has a disability, but where it becomes aware of this fact it should make sure that the law is applied. Any transactions with the parcel should comply with the legal provisions in place for such people. In some cases, it could mean that one or more trustees need to be appointed who could sign. In other cases, signatures might be available through a power of attorney or court authorization of transactions. Where the person can fully understand, then a law on signing by a mark or fingerprint might apply.

Legal entities: There is generally no problem identifying and recording a legal entity, such as a business enterprise or non-profit association, as the holder of rights, although increasing attention is now being paid to the identification of the beneficial owner in line with measures to deal with money laundering and fraud. The legal entity can be simply recorded as the holder, as would be the case in any other legal transaction or activity. The legal entity should be accurately described in the records, using the correct legal name as described in its charter, articles of association or other foundation document. Many states also assign a unique registration number to legal entities, and that number should be included with the name to aid with the identification of the entity and to enable information to be accessed from the registry for legal entities (for example, a companies registry). The rules on transactions and signing on behalf of the legal entity apply when it makes any transaction with the parcel. Where the legal entity becomes bankrupt or is liquidated, the law on bankruptcy or liquidation should describe who can sign on behalf of it, and the registry needs to apply those rules as long as evidence of the bankruptcy and appointment of the trustee or administrator is provided.

Unincorporated associations and trusts: Sometimes associations or trusts (such as sports clubs, children's

associations, private community schools and nature reserve preservation societies) do not incorporate as a legal entity. In these cases, it is usual for the office holders or trustees to be recorded as the right holders, on behalf of the association or trust. Alternatively, the office holders or trustees can be recorded as if they hold the parcel themselves, but this increases the risk of fraud for the associations.

Mortgagees: When mortgages are recorded, it is optional whether to also record the names of the mortgagees (lenders) as described in a mortgage or loan agreement. This is because a mortgage is usually a private arrangement between the owner and lender, and the mortgage should be removed before the parcel is sold. If it is not removed, the new sales transaction would be subject to the mortgage whether the mortgagee's name appears or not. In any case, the name of the mortgagee is on the mortgage document, which should have a unique reference number, and so the name can be found as long as that mortgage document number is shown on the parcel record. However, it is useful to record the name of the mortgagee so that when the mortgage is discharged, terminated or varied, the name of the mortgagee can be identified immediately, without the need to check the original mortgage document.

Lessees: When a lease is recorded, it is optional to record the name of a lessee on the parcel record. As with mortgages, this is the case because the identity of the lessee is shown in the lease document, which can be found using the unique reference number of the lease document. But, again, it is useful to record the name of the lessee in the register because doing so makes it easier and quicker to identify the lessee when a transaction involving the lease (e.g. termination, variation, extension, mortgage of lease) is presented for recording.

Life estate/remainder holders/personal servitude holders: The name of the person who owns a life estate or holds a personal servitude can be recorded where the law permits a parcel to be held in this way. The record should make it clear that the person's rights exist only during his or her lifetime. It is also common to record the name of the person (sometimes known as the remainder person) who will become the holder after the death of the holder of the life estate or the personal servitude. However, the record should be clear that this person holds only the remainder, not the entire ownership, and that his or her rights do not arise until the death of the holder of the life estate or personal servitude.

Easements/predial servitudes: It is not common to record the name of the person who benefits from an easement or a predial servitude because the easement or servitude benefits a particular parcel rather than a particular person. The benefit of the servitude or easement to the specified parcel will continue no matter who holds the ownership rights to that parcel. As a result, there is

no advantage to showing the name of the holder of the parcel with the benefit: while the parcel might be owned at present by Ms X, in the future, it could be owned by Ms Y. Instead, it is important to use the unique identifier of the parcel that has the benefit. If anyone needs to know who holds rights to that parcel, he or she can find that information using the unique parcel identifier.

Contingent right holders: In general, the names of people whose rights have not yet come into existence are not recorded. This can arise, for example, in the case of inheritance before the holder has died, and in the case of divorce before the court has declared the divorce to be final. The names are not recorded because the rights have not yet been fully created or transferred, which is why they are described as "contingent". The existence of the rights is dependent on another event (such as death or a court order) and until that takes place, there is no right against which the person can be recorded as holder. However, in some systems, it is possible to record a notice or warning about contingent rights, such as through caveats or official notifications, to advise that the right might arise. An example is the notice of expropriation that some governments record before they formally acquire a parcel.

Unknown holders of rights: Sometimes the holder of rights (such as an owner) of a parcel cannot be found, but it is clear that the right is private. This can be addressed by recording the state as a trustee for the unknown holder. If the person is later identified, he or she should have a right to recover the parcel.

Public land, fisheries and forests: A variety of matters can arise with publicly-held resources. While there might be agencies for managing buildings, land, fisheries and forests, it might not be clear which agency has responsibility for a particular parcel, or the relevant agencies might be known at the national level but not at the local level. There is a need to work with local bodies that represent the state's interests, such as the local government, prosecutor's office and tax office, to identify an appropriate representative who can ensure that the state's rights are not infringed. The need for state representation also applies to confirmation of the boundaries of the parcel. If there is no representative of the state to protect its interests, then neighbours can easily claim that their rights extend over the actual boundary and onto the state's land, fisheries or forests.

PARCELS

Tenure rights relate to parcels, which are three-dimensional objects because rights can exist for:

- ♦ the surface of the earth, for cultivating crops, for grazing livestock, for growing trees, for building a house, etc.;
- ♦ the subsurface, to take minerals, to run pipes or

cables, to travel through tunnels, to construct underground shopping areas and parking garages, etc.;

- ♦ the air space above the parcel, to construct multi-storey buildings or a skywalk above a road to provide access between buildings, etc. Some states limit the height of buildings but allow someone with a building below the height limit to transfer the unused air space right to another parcel, thereby allowing a building on that other parcel to exceed the height limit.

The size and shape of parcels

The size and shape of parcels can vary significantly. Some rights of way run for hundreds of kilometres, as shown on the parcel maps of the Spain in the case of the transhumance routes for driving livestock between winter and summer pastures. Elsewhere, transhumance routes can link lands used in rainy and dry seasons. Private livestock ranches can be immense and cover over hundreds of thousands of hectares (for example, a single ranch in Australia covers 23 000 square km), but these can comprise a number of contiguous parcels rather than being a single parcel.

Registries have to take into account the limits for the size of parcels set elsewhere, such as in laws for spatial planning and the subdivision of parcels. Upper limits are not usually set for the size of a parcel although some states do. In a number of states, regulatory approval is required for the purchase of agricultural land above a threshold size or value, and other states prohibit the acquisition of land above a stipulated ceiling. However, where thresholds and ceilings exist, they usually relate to the total area that is held by the person, regardless of the number of parcels that comprise that area.

Minimum sizes of parcels for residences, farms and forested areas, etc., are sometimes set in regulations for spatial planning and the subdivision of parcels. The effect is that parcels below the threshold are not eligible to be recorded. In particular, high population densities and limited off-farm income in rural areas in some states can result in parcels becoming increasingly smaller as the heirs continue to subdivide the parcels among themselves. Where parcels cannot be recorded because of their small size, the rights tend to move from the formal sector to the informal one. Other states place no limits on the minimum size of a parcel that can be recorded.

Boundaries of parcels

A person can have rights to one parcel but not to the neighbouring parcels. The boundaries between the parcels indicate the spatial limits of the enjoyment of the rights: they can be enjoyed here but not there. The definition of the boundaries in the records of the registry will be representations of the actual boundaries.

The corners of a parcel can be identified on the ground as objects that have been set specifically as corner markers (e.g. steel pipes, rods or stakes, concrete pillars) or other objects that are identified as the marker (e.g. a tree, a fence post, a building corner). In areas where natural disasters occur, the location of markers may need to be assessed after the event. The boundaries of a parcel can be identified as a straight line between two parcel corners or as a physical feature such as a wall or hedge, path or road, or water body.

Boundaries are sometimes described as being “general” or “fixed”. These terms can cause confusion. The term “general boundary” originally developed in England and was based on the features that had been used there to mark parcel boundaries; i.e. walls, fences, hedges, ditches, streams and roads. A general boundary simply means that the exact line of the boundary is not identified (i.e. the boundary line is not specified, but could be anywhere in the feature, such as in the centre of a wall or on one side or the other of it). General boundaries are contrasted with “fixed boundaries” where the exact line of the boundary has been defined, such as the centre of the wall. In other states, the concept of fixed boundaries varies; for example, a boundary may be regarded as fixed when a second survey agrees with the first survey. Over time, the term fixed boundary has come to be associated with parcels where markers have been placed at the corners with the boundaries being the straight lines that can be drawn between the markers.

Where parcels are to be identified for recording purposes, such as through first registration, there is sometimes a debate as to whether the parcel boundaries should be general boundaries (meaning that physical features such as a hedge should be used as the boundary) or fixed boundaries (meaning that markers should be placed at the parcel corners). In practice, both types can be used in the same system: where physical features in the landscape (such as hedges) already mark the boundaries, it is simpler, quicker and cheaper to accept the features as the boundaries. Where new parcels are being established and there are no physical features along the boundaries, markers can be placed to show the limits of the parcel on the ground. For example, Rwanda uses both general boundaries (meaning hedges, etc.) and fixed boundaries (meaning placed markers) in the same system.

In the case of rights over water bodies, such as marine leases, it is usually not practical to demarcate the boundaries. Instead, the boundaries are identified by coordinates.

Parcel maps and survey records

The description of a parcel in a recording system is a representation of what is on the ground or the water in the case of fisheries and other aquatic-related rights, and what is above and below. One set of attributes

is information on the location of the parcel in relation to surrounding parcels, to topographic features (such as roads and water bodies) and to its overall position (through the use of coordinates). Other elements of location include street addresses and the relevant administrative jurisdictions. Another set of attributes involves the size and shape of the parcel: its area and dimensions.

Parcel maps: One of the most important elements of a recording system is parcel mapping, which shows the locations of parcels in relation to one another, and with each parcel being identified by its unique identifier, which is usually represented by a number or combination of numbers and letters.

Traditionally, parcel maps were created after the parcels had been surveyed using ground techniques. In some states, the parcels were surveyed systematically, which allowed the maps (often referred to as cadastral maps) to be compiled at the time of the surveys. Elsewhere, surveys were of isolated parcels and were done sporadically, so the parcel maps were often developed much later when technological developments allowed the isolated surveys to be referenced to a common coordinate system. England and Wales in the United Kingdom of Great Britain and Northern Ireland provide an example where individual surveys of parcels were not carried out and, instead, the parcels are represented using a base of comprehensive large-scale topographic mapping produced by the national mapping agency.

Today, parcel maps are usually created using orthophoto mapping and, more recently, satellite imagery, without using detailed ground surveys. The topographic features (such as buildings, roads, hedges and water bodies) of imagery with good spatial resolution can be used to assess the location of the parcel boundaries for representation on “parcel index maps”. These maps provide a representation of each parcel with regard to its shape, location and relationship with other parcels, and they identify each parcel with its unique identifier. However, as signified by the use of the word “index”, the maps do not provide additional details on boundary measurements or a description of the features that represent the parcel corners and boundaries.

Parcel index maps should be sufficiently accurate to avoid the gross misrepresentation and confusion that has arisen, for example, when unrectified aerial photographs (which have various degrees of distortion) were used for the identification of parcels. However, experiences show that high spatial accuracy is not necessary for a recording system to function. In England and Wales in United Kingdom of Great Britain and Northern Ireland, the title plans are based on topographic mapping at 1:1 250 scale in urban areas (where the width of a line on the map represents 0.3 m on the ground); 1:2 500 scale in rural areas (where the width of a line on the map represents 0.6 m

on the ground); and 1:10 000 scale in mountainous areas. However, while high accuracy is not needed for parcel index maps, increased accuracies are becoming possible at little extra cost with the technological advances of Global Navigation Satellite Systems (GNSS) such as the Global Positioning System (GPS), and new generations of satellites that offer imagery with a resolution of 0.3 metres at more affordable prices.

Other survey records: A number of states require the survey of a parcel to comply with prescribed standards before it can be recorded. Requirements often include that the work is carried out by licensed surveyors according to standards set in the survey legislation. The survey records produced from the survey of a parcel may have to be submitted to the registry: in some states the survey records are only the final survey plans while in other states they also include the survey observations and calculations. These detailed records can provide valuable evidence for the re-establishment of parcel boundaries or for when a parcel is to be subdivided.

Where there are requirements for the detailed surveying of parcels, there may not be a need to change procedures if the practice functions well and services are easily available and affordable to all. However, such requirements should be reviewed where the surveys proceed slowly because of limitations in the number of surveyors, or where the costs are so high that many people cannot afford them. In such cases, more cost-effective alternatives should be adopted, such as the creation of parcel index maps without surveys of individual parcels, and the use of parasurveyors. In such cases, states could proceed with the preparation of parcel index maps to allow the recording of rights to take place, and a survey of greater accuracy could be done for an individual parcel if it is required for some reason. (See the discussion on identifying parcels in [Systematic registration](#) in chapter 4).

Where a registry is being created for the first time, or where it wants to extend its services to new areas or new categories of rights, it must obtain the information on rights, holders and parcels that is to be recorded. Because the information is being entered in the recording system for the first time, this process is often known as “first registration”. This chapter looks at the options that a registry can use for first registration.

Sometimes the term first registration is also used for the conversion of an existing recording system to a new one. That type of first registration is addressed in the companion guide on [*Improving ways to record tenure rights*](#).

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4. FIRST REGISTRATION

Key points of this chapter

- ◆ First registration refers to the process by which information (on rights, holders and parcels) is identified and entered in the recording system for the first time.
- ◆ Two options for first registration exist: the systematic approach, in which rights are recorded for all holders on an area-by-area basis as part of a programme; and the sporadic approach, in which rights are recorded on a case-by-case basis when individual holders apply for the recording of their rights and parcels.
- ◆ Systematic registration is a more public process, with several checks and balances, and it has a lower cost per parcel. Sporadic registration is not a public process, so requires greater care in checking the information, and it also has a higher cost per parcel.
- ◆ Systematic registration can complete large areas in a relatively short time, while sporadic recording can take decades to identify and record all rights, holders and parcels.
- ◆ The process for systematic registration follows clear steps in a sequence that has been used around the world, beginning with public notification, investigation of parcels, holders and rights, then a public display of the results and a period for appeals. The process is finalized by a declaration that the work is complete and, in some states, the distribution of certificates of registration.
- ◆ Special considerations exist where customary rights are being recorded for the first time, particularly where multiple rights exist over the same parcel. Community and individual ownership can co-exist, but extra care needs to be taken to ensure that recording the customary rights of an individual person does not extinguish the customary rights held in common by others.
- ◆ Before beginning a programme of first registration, it is important to have in place the legal framework, dispute resolution mechanisms, clear definition of roles and responsibilities of officials, and a clearly documented process. Communications with people who hold rights is essential.
- ◆ Mistakes will inevitably occur during first registration, so a procedure to correct mistakes must be in place from the start.
- ◆ For the recording system to be sustainable, the procedures and administrative services need to be established early on. Changes to rights, holders and parcels can all be expected soon after first registration, and if holders cannot record their changes, then the recording system will soon become out-of-date.

OPTIONS FOR FIRST REGISTRATION

In first registration, the rights, holders and parcels are formally identified and then recorded for the first time. First registration can be used to record various types of rights, holders and parcels, such as land tenure rights (including to buildings and apartments), fisheries tenure rights and forest tenure rights, as well as other rights, such as water rights, rights to vehicles (such as cars, boats and aircraft) or rights to factory plants and equipment. The process of first registration is contrasted with the recording of subsequent transactions (such as sales, gifts, mortgage, leases, inheritance) and changes to the parcels (such as subdivision and consolidation) that occur with already recorded rights, holders and parcels (see [Beyond first registration](#) in this chapter).

In some cases of first registration, the rights have had legal status for a long time but have not been officially documented in a recording system. In such cases, the focus of first registration is on confirming the rights for the purpose of creating a reliable record.

In other cases, first registration follows other processes in which the government creates or changes rights (such as the allocation or redistribution of rights to parcels, or the consolidation of parcels). For example, many states in Eastern Europe and Central Asia had major programmes of restitution of parcels and the privatization of apartments as well as collectives and state farms (which often included their subdivision and allocation of parcels to the former members). Following privatization and restitution, information on the new rights, holders and parcels was recorded in the registries. Such cases are ongoing as new categories of rights (such as water rights) are created or allocated, and then recorded.

In yet other cases, first registration follows the processes of giving legal recognition to rights that had existed in practice (*de facto*) but not in the law (*de jure*). For example, the recording of customary rights in an official system becomes possible after reforms that grant legal status to customary tenure. The customary rights have not changed but have become eligible to be recorded. In a similar way, with the formalization of informal settlements, new laws can create new legal rights using the informal rights as a base, and these new formal rights can be recorded.

First registration has traditionally been carried out using one of two approaches:

- ◆ Systematic registration, where the work is done on an area-by-area basis, with each parcel being investigated one after the other until all the parcels have been identified and recorded. It has typically been done through a government programme (see [Systematic registration](#) in this chapter).

- ◆ Sporadic registration, where the work is done on a case-by-case basis. The decision of whether and when to record the parcel and rights is with each holder (usually the main right holder, but it is sometimes possible for subsidiary right holders such as mortgagees or lessees to apply). The holder is responsible for submitting an application for first registration, supported with all the necessary documents (such as a description of the parcel, often with a survey plan prepared by a surveyor), and evidence of the rights (such as ownership, leases, mortgages, easements and servitudes, which is usually prepared by a lawyer).

As a result, first registration has typically occurred in those states where the government has taken the initiative to implement a systematic registration programme, or else in states where some people have been able to afford the costs of sporadic registration. In the absence of government-led systematic registration programmes, the poor have largely been unable to afford the time and cost of getting their rights recorded.

Another approach involves international NGOs working with national NGOs, often with financial support from philanthropic foundations or donor agencies, to prepare and present the necessary information so that the registry can easily and quickly record it. This assistance allows people in communities to identify their rights and parcel boundaries and prepare the survey plans, maps and other documents needed to obtain the certificates for their rights from government agencies and to have their rights recorded. In doing so, the poor who are not able to participate in conventional sporadic registration can receive the support they need to have their rights legally recognized and protected. This approach is similar to systematic registration given its focus on working with communities and the support given to the participants.

In all cases, a clear legal framework and set of institutional and operational arrangements should be in place for first registration to occur. The law needs to make it clear how the procedures will work and the rights and obligations of both officials and holders (see [The registry law](#) in chapter 6).

In addition, it should be expected that the identification of rights, holders and parcels will bring some latent conflicts to the surface. Ways to identify and resolve conflicts should be an integral part of the process of first registration.

Public scrutiny: As systematic registration takes place on an area-by-area basis, all claims to rights in a community should be identified and mapped simultaneously. The results can be displayed publicly so that all community members are able to review all the claims for parcels at the same time, which helps to ensure that the records correctly reflect the rights of all (see [Systematic registration](#) in this chapter).

In sporadic registration, the case-by-case process means that the application has little information on neighbouring parcels and their rights, nor is there usually an effective process for public display. At most, the registry will publish an advertisement in a newspaper and possibly place a sign on the parcel to let anyone know that the holder will be officially recorded and that they should appeal if appropriate. If no objections are received by the end of the notice period, the parcel and the holder are recorded. The reduced level of public scrutiny means that even with checks by registry staff, there is potential for sporadic registration to be more susceptible to mistakes, corruption and fraud.

Costs: Systematic registration brings efficiencies; for example, a boundary between two parcels needs to be mapped only once, and costs can be reduced by preparing index maps rather than detailed surveys of each parcel. The unit costs of recording rights, holders and parcels are relatively low because of the economies of scale. However, the total cost can be large as states usually introduce systematic registration in all or most areas. The costs of systematic registration are typically covered by the government (although sometimes with support from international financial institutions) as a public good that benefits the whole society. It is usually free to the holders of rights. Depending on the level of detail, the activities involved and the local costs, systematic registration can cost anywhere from US\$ 5 in Rwanda or under US\$ 10 in Kyrgyzstan to US\$ 200 or more per parcel elsewhere.

For sporadic registration, the unit cost is higher because there are no economies of scale, so the total cost for covering all areas will also be higher. However, the state usually does not pay this cost. Instead, the person whose parcel and rights are being recorded usually has to pay the cost of the survey and the legal work to prepare the documents as well as the fee to the registry to investigate the application and record the results. Even where the person can do all the work himself or herself, there is much time and effort involved in collecting the information, making the application and then dealing with the registry. The total cost will vary from one state to another, depending on the fees charged by professionals and the registry, but it can commonly be the equivalent of a person's salary for several weeks.

Time to provide complete coverage: If the goal is to allow all people to record their rights, the area-by-area approach of systematic registration allows recording to be completed in a relatively short space of time, although the total length of time depends on the size of the state, number of holders and parcels, and availability of resources. As an example of a quick programme, the systematic registration of over ten million parcels and over eight million titles took about five years in Rwanda.

The sporadic approach to first registration is a slower process, particularly where it depends only on the interest of the holder. Even with making registration compulsory in some instances (such as the requirement of recording being triggered by sales, leases, inheritances and mortgages), it can still take decades or even hundreds of years before all parcels and rights are recorded.

SPECIAL CONSIDERATIONS FOR THE FIRST REGISTRATION OF CUSTOMARY RIGHTS

A global phenomenon is the increasing provision of legal recognition of rights of indigenous peoples and other communities with customary tenure. How these rights might be recorded and the issues involved can vary considerably. For example, there can be significant differences between states where the resources held under customary tenure are in the minority (such as in Australia, Canada and New Zealand) and where customary tenure is the predominant way of obtaining access to land and other natural resources (such as in Africa and the Pacific Islands). In the first category, the inclusion of customary rights is an incremental change; for the second, the recording of customary rights can mean that recording systems must be built or adapted to address the rights of the majority of people.

Recording the rights of women should receive specific attention because in many cases it will require responding to the question of who is a member of a community. Where women have married into the community they have often not been able to hold rights directly. Constitutional and legal reforms that strengthen the rights of women often conflict with long-standing customs: in such cases, there is a need to accommodate the changes brought by the reforms into the customary systems (see Guidelines paragraph 9.6). Even where women are legally recognized as holders of customary rights, the experiences with other forms of tenure suggest they will continue to be marginalized unless they are explicitly recognized as holders of rights in the law and records of the registry.

Identification of the rights to be recorded

States have increasingly enacted legislation that protects customary rights whether or not they are recorded, although many are interested in recording these rights, too. Benefits to both individuals and the whole society can flow from recording rights but there is a need for caution at times; for example, in cases where restitution is required and where rights are evolving rapidly, are weak and should be upgraded, and are highly variable (see [Benefits of recording rights](#) and [Are recording systems needed everywhere](#)

[and should all rights be recorded?](#) in chapter 2). In particular, customary tenure rights can be complex and interrelated, where people and families can have individualized rights to specific areas for crop cultivation while other community members also continue to have rights to those areas, such as a right of way, a right to water in that area or a right to collect firewood (see [Forms of ownership and how they influence other rights](#) in chapter 3).

The type of rights that are to be recorded should be identified together with the beneficiaries: the people who hold the rights. If only some rights are recorded, care should be taken to avoid other unrecorded rights from being extinguished. For example, if some customary rights are not recorded, the legal framework should make clear that those rights are still legally valid and are not extinguished by the recognition and recording of individual customary rights of usufruct and ownership. This is particularly important where those unrecorded rights are held by the more vulnerable and marginalized members of the community. Further, care should be taken to provide support and guard against these unrecorded rights being extinguished in reality, even if not legally; for example, where the usufruct holder or owner erects boundary walls that prevent others from entering the parcel and enjoying their customary rights.

Rights that might be recorded include the following:

The rights to an area held by the community: Recording of rights to the area used exclusively by a community can help to provide publicity and protection against the unauthorized use of that area by others, including the government. Where the community holds ownership rights to its area, the parcel can be recorded just as any other parcel, with the owner being identified in some way as the corporate body of the community.

In other cases, the area used by the community is on land owned by another. For example, most forest lands in Africa are legally owned by the state while in practice the forests are used and managed by communities through customary tenure. In these cases, the rights of the community would be something other than ownership, such as custodianship, unless the state embarks on a reform to transfer ownership of the area to the community.

Rights that might be recorded for portions of the community area: There is increasing interest in the recording of rights for the specific use of individuals or families for cultivation and residence. Several states provide for these rights to be held individually or jointly, to be perpetual and heritable, and to be transferrable to others subject to permission from the community. Depending on the state, the rights can exist as customary ownership or some form of usufruct (see [Forms of ownership and how they influence other rights](#) in chapter 3). The rights, holders and parcels of such cases of customary

ownership and customary usufruct can be relatively easily identified and recorded.

In addition to the rights of individuals and families to specific portions of the community area, a number of other subsidiary rights can exist, such as rights to graze livestock, collect firewood, fish, hunt and obtain water. These subsidiary rights usually exist for common portions of the community area but they can also exist in those portions that have been allocated for the specific use of individuals and families. Subsidiary rights are likely to be more difficult to record than customary ownership and customary usufruct, and care must be taken to ensure that subsidiary rights are not inadvertently extinguished when recording the rights, holders and parcels in the cases of customary ownership and customary usufruct. For example, subsidiary rights could be defined as overriding rights (see [Rights](#) in chapter 3).

Moreover, communities can allocate parcels through leases to non-members for residential purposes (often in areas affected by urban expansion) or for commercial purposes, including to investors looking for land for agricultural investments.

Rights that might be recorded for areas shared by communities: Communities are often not isolated, self-contained groups that administer only the rights that are held collectively and individually by their members. In many cases, in addition to the areas used exclusively by a community and its members, there can be other areas that are shared with other communities.

Identification of the processes and system to be used

Systematic first registration should use participatory processes (see [Systematic registration](#) in this chapter), and this is particularly important for the first registration of customary rights. There is a need to work with the community members, men and women, as well as the leaders.

Recording customary rights will typically require the need to permit oral evidence and alternative forms of evidence (such as that of elders or even sociologists in the case of land claims by Australian Aborigines). Such evidence should be accepted for all relevant aspects of recording: the nature and extent of rights, holders (including shares and multiple holders), and parcels and boundaries.

Where rights within the community area are to be recorded, several possibilities exist. One option is for the community to maintain records of rights, holders and parcels within the community area. In this case, the state recording system extends only to the records of the community's right to its area and the boundaries, and everything within the boundaries is regarded as an internal matter for the community. Another option

is for the records of rights of the individual community members to be recorded in the state recording system. However, this is likely to be possible only for situations of individual ownership or usufruct rights that are perpetual, heritable and transferrable, but not for subsidiary rights, particularly rights that allow community members to have unrestricted access to some of the resources.

Projects that help people to document their rights can make a significant difference. Technological developments such as smart phones, tablets and open source software are helping to reduce the costs of first registration of customary rights, and they can help to present information on rights in ways that are more easily understandable to many people (such as by using aerial photography or satellite imagery as backgrounds). In doing so, they have the potential to help improve the tenure security of many hundreds of millions of people, including those who are particularly vulnerable and marginalized.

However, particularly where a large percentage of the population is not served by formal systems to administer rights, projects with cost-effective ways for first registration meet only the initial challenge of getting rights recorded. The ongoing challenge is the development of a sustainable system for administering those rights after the completion of the first registration programme. A common experience around the world is that heirs have often not taken steps to update the records upon the death of a person whose rights were recorded in a first registration programme, or the transfer of a parcel is not recorded. Simple, cost-effective and accessible means to maintain recording systems are needed to ensure that people continue to use the systems and find value in them (see the companion guide on [Improving ways to record tenure rights](#)).

ADDITIONAL INFORMATION

FAO. 2014. *Respecting free, prior and informed consent*. (available at www.fao.org/docrep/019/i3496e/i3496e.pdf).

FAO. 2016. *Improving governance of pastoral lands*. (available at www.fao.org/3/a-i5771e.pdf).

FAO. 2016. *Governing tenure rights to commons*. (available at www.fao.org/3/a-i6381e.pdf).

REDUCING THE RISK OF FAILURE OF FIRST REGISTRATION

There are many examples of programmes for first registration that have not succeeded in meeting their goals. Some ways to reduce the risks of failure are described as follows (see also [Systematic registration](#) in this chapter).

A common reason for failure is the lack of adequate preparation. First registration programmes are often launched quickly because of political and other pressures. These programmes can be costly and complex, particularly when new recording systems are also required, and problems are likely to emerge if first registration is rushed at the beginning. The following aspects should be considered when preparing for first registration.

Getting the framework in place: First registration should not start until all instruments for maintaining the information are in place and working. For example, the law and regulations, registry and recording system should exist (see chapters 5 and 6), and people should be able to record changes immediately after first registration (see [Beyond first registration](#) in this chapter). The situation of information on rights should be investigated and all existing information maintained by the relevant authorities should be collected and evaluated before starting first registration fieldwork. Quality standards and quality control methods and procedures for first registration need to be prepared before the work can begin. Similarly, dispute resolution mechanisms need to be in place.

Defining roles, responsibilities and developing the capacity: A body, such as a commission, is needed to make decisions on rights, holders and parcels during first registration. The body should have representatives of the local communities in which it operates. It should have final authority in that the information approved by it can be recorded without the need for further investigations. (In states with a notarial system, the body will replace the notary). Where there is any disagreement between claimants, the body should preferably engage in mediation and in arbitration, but if needed, it should be able to make decisions on conflicts, with the parties having the right to appeal to a higher-level commission or court. (See [Systematic registration](#) in this chapter).

A common option is for the registry, supported by temporary staff, to undertake core activities, such as the identification of holders and boundaries, the validation of legal documents and mediation. The technical aspects of first registration have often been contracted out to private companies. In order to use local expertise, the financial and other requirements for tendering processes should not unnecessarily exclude smaller local companies from bidding to participate. All should have the required capacity to carry out their tasks when first registration starts. For example, the registry should be able to supervise the work and undertake quality control. Relevant public bodies that hold rights should have the required capacity to protect their interests and to be involved actively. Training for all those involved is, therefore, essential (see “Improving staff resources” in chapter 6 of the companion guide on [Improving ways to record tenure rights](#)).

Defining the processes: Clear manuals should be prepared to guide all aspects of the work, including addressing special cases. The rights that are to be recorded should be identified (see [Special considerations for the first registration of customary rights](#) in this chapter). Ownership rights are commonly the focus of first registration but it is important to take notice of other rights, such as individual use rights, common use rights or servitudes.

A deadline should be set for submitting documents to avoid protracted delays in the process, but the need to complete the work should be balanced with the need for due process. Parties who do not meet a fixed deadline will be excluded but the deadline may need to be adjusted if there are many problems and alternative measures may need to be established for people who have difficulty submitting their documents.

Effective communication is vital. All public bodies and all other people holding rights (including representatives of the government) should be properly informed and involved so they can take action. Communication campaigns will need to take into account differences in how men and women are able to access information, and the campaigns should ensure that all holders understand the meaning of rights and the purpose of the process and its operational aspects. Public trust in the work and the final results depends on a transparent and participatory process.

Processes should be as simple as possible to achieve the goal of first registration. Only essential documents should be requested. Boundaries agreed in the field by neighbours are more important than precisely surveyed parcels, and the appropriate standards for first registration will need to be developed and accepted by the surveying profession and others. An appropriate web-based ICT application can increase efficiencies and allow the registry to monitor the work as it is progressing. The ICT application can be used to manage the information, including for the approval by a body such as a commission and for the migration of the information into the recording system.

BEYOND FIRST REGISTRATION

Work does not stop after a programme of systematic first registration is completed. No matter how good the process, there will be mistakes that need to be corrected, and immediately after first registration there will be a need to update records to reflect changes.

Correcting mistakes

Programmes that have implemented first registration often result in mistakes and discrepancies in a small,

but noteworthy, percentage of cases. There are many reasons for this, such as the absence of people who hold rights, lack of completed inheritance documents, disputed cases that cannot be resolved, and simple office or procedural mistakes. Although these programmes set out to create fully reliable records, it should be recognized that mistakes will occur even with the best quality control processes in place.

The first registration programme should include mechanisms for dealing with the mistakes and omissions that invariably occur. Some examples include:

- ♦ cross-checking the registry records with information from other sources (such as local government or tax records) to identify discrepancies and then make corrections accordingly (with appropriate notice to anyone who might be affected);
- ♦ having administrative procedures which allow people to report mistakes and have the records corrected free of charge; and
- ♦ including statements in the law that records cannot be regarded as fully reliable until a certain time has passed or the parcel has been sold at least once.

People should be encouraged to report mistakes and other problems with the records, and the process for doing so should be simplified. Internet access to the records can allow this to happen on a large scale. For example, Ukraine encouraged people to review digital records and to report discrepancies so they could be corrected. Approximately 16 million land records were made available on a public portal, and in the first month, 600 000 checks had been made by the public and almost 11 000 requests were made to correct mistakes. Within two weeks, 7 700 corrections had been made. A similar programme had previously been successfully conducted in Croatia. Where widespread access through the Internet is not possible, mobile offices could provide access to digital information in remoter areas along with conventional paper maps.

Updating records

The registry should be ready to update the records immediately after completing first registration.

Changes to rights: For subsequent registrations, the identification of rights is usually routine where the rights recorded in first registration are to be transferred, mortgaged, leased or inherited. Where there is no change in the rights, nothing further may need to be considered. However, on occasion something can occur that raises questions over the quality of an existing right, and which then reduces the ability of the holder to transfer the parcel to someone else. The problems that can arise depend on the legal rules of the system but examples include pending litigation, problems or disputes over ►►

SYSTEMATIC REGISTRATION

Systematic registration is normally regarded as a good practice when creating a new system but it can take a number of years before an entire state has been covered. Sporadic first registration may have to be used in areas where systematic first registration has not yet been introduced.

Systematic registration is generally conducted by the government in a programme to record a large number of parcels relatively quickly. In some cases, a government agency is responsible for the determination of rights and parcels, and for issuing titles or certificates for the rights and parcels. This often happens where legal rights are being allocated for the first time, such as in cases of privatization or the formalization of informal rights. In these cases, the role of the registry is to record the titles once they have been issued. In other cases, the registry can play the lead role in determining the rights and parcels, as well as in recording them.

Having one agency responsible for issuing titles or certificates and another (the registry) responsible for recording them can bring benefits as it provides checks and balances, whereby the registry confirms the correctness of titles before recording them. However, in practice problems arise where there is a lack of coordination between the titling agency and the registry. Moreover, where there are multiple titling agencies, a lack of coordination can result in different agencies issuing titles to different people for the same parcel. There is a need for close coordination with the registry to ensure that the titles and documents being issued are capable of being recorded.

It is often necessary to outsource at least some of the work, either by employing individuals or outsourcing the whole activity to a company. However, it is important that the registry maintains a role in overseeing the process and also for quality control of the output.

Priorities for a programme of systematic registration

In a programme of systematic registration, the government usually adopts a plan to record all the parcels, working area by area, and to do so within a certain time frame, such as five, ten or 20 years, depending on the available resources. The size of each of the areas is also determined by the availability of resources, particularly the availability of skilled people to do the registration.

An important consideration is where to initiate the programme given that it could take years to provide complete coverage. If first registration begins in urban areas, those in cities will benefit first. Conversely, if the programme begins in areas where there is little need or demand, then the benefits might not be fully realized. Another consideration involves types of parcels to be registered. For example, work can

begin with valuable parcels or those that are traded often, such as those in major urban areas. Alternatively, first registration might be necessary for vulnerable people to protect their rights from encroachment; therefore, social justice is the primary consideration. A good approach is to begin first registration in a range of areas, such as urban, peri-urban (particularly important because such areas can change rapidly), agricultural and other rural areas, and to have a range of beneficiaries as the targets. In this way, the benefits of recording rights can be made available to all and the problem of “elite capture” of the benefits of recording can be addressed.

Efficiency is another way to decide where to allocate resources. Under this approach, priority can be given to cases where investigation on the rights, holders and parcels have already taken place, such as:

- ◆ before large parcels are to be subdivided and sold or otherwise allocated;
- ◆ where new rights are being created; and
- ◆ where parcels are expropriated, consolidated or allocated as new parcels by the government, or re-allocated through redistributive reforms.

The process of systematic registration

Systematic registration is conducted within a selected area, and the rights, holders and parcels are recorded following field work and investigations of records. At the end, the area is declared to be complete, and systematic registration starts in the next area of priority.

The process should be designed so that it is simple, open and accessible to all within society. Prior to starting work in an area, a public awareness programme is conducted and local people are informed about the process and advised on how it benefits them, how they can participate and what documents and other evidence they need to provide. Public participation, acceptance and accuracy of results can be ensured through informing and engaging the community at public and outreach meetings and by providing other forms of support, such as citizens’ advocates.

The technical work is usually conducted by small teams of specialists. The role of the people who hold rights is important, as is the community because the members can help to verify information. Earlier approaches of systematic adjudication tended to be technocratic and authoritarian, with the adjudication officer exercising his power (as at that time adjudication officers were invariably male) and summoning the claimants to identify their claims. Modern approaches are community-oriented and participatory. The power of the community is used in the collection of information on rights and parcels that are being claimed, and in the validation of those claims; for example, through the public scrutiny of the claims.

The investigation of rights, holders and parcels (and including any restrictions, such as easements and servitudes)

draws on existing legal documents on rights (e.g. government documents, sales contracts, inheritance decrees) and other records (e.g. tax receipts, voting rolls, utility bills). However, in many situations such written evidence will not be available and the evidence of the person who claims the right, the neighbours and the community can be used.

Identifying rights: Unclear or undocumented rights can present problems. Some people will not be able to show documents in full compliance with the law. Examples include where the rights to a parcel are unclear or undocumented, particularly rights arising from long-term possession or occupation; and where people have some legal documents for a parcel but are missing others or have informal documents that are not made in complete accordance with the law. Another example is informal multi-holder arrangements (flats or compounds) where a group of people or families occupy two or more residences on a single parcel of land, sometimes around a courtyard or other commonly used area. However, their legal rights to the parcel might be unclear or not based on any formal agreement.

The registry should be legally able to accept oral and other forms of evidence about a person's rights, including rights of long-term possession, and that may require a change to the law prior to starting systematic registration. Alternative forms of evidence can include confirming facts with local authorities, local leaders and community members, or through reference to other sources, such as tax payments, utility bills or voting rolls. In the case of the recording of rights in informal settlements in Peru, the law recognized the informal proofs of ownership that were already being used by people in the informal settlements, such as payment receipts of the property tax issued by municipalities, domicile certificates issued by the police or judges, loan contracts with public or private entities for purchasing building materials, the declaration of adjoining neighbours and contracts transferring the right of occupation.

A title could be issued with limitations ("limited as to title") if it met some but not all the requirements for a standard title. New Zealand and Australia used such an approach in its conversion to a title system, and if the title was unchallenged, the limitation was automatically extinguished after twelve years (a period associated with acquiring rights through adverse possession). Ghana allows for provisional certificates to be issued.

Identifying holders: Special care is needed with identifying holders who are spouses, children, people who are illiterate or with disabilities, people who hold rights other than ownership, where many people are co-holders of rights to a parcel, where the owners or other holders cannot be identified and where the state holds the rights (see [Right holders](#) in chapter 3).

Older documents can often contain only the name of the head of the household and not the name of the spouse or other holders. Care should be taken to ask who else holds rights to the parcel, and there should be space on the

relevant forms for a number of names (rather than just the head of household). Ownership should also be confirmed with local officials, and the leaders and members of the community. During the investigation, it is also important to identify each person's share, if two or more people hold the right and if the legal system allows it. Further, where there are two or more owners, the question of how they hold the right between themselves needs to be determined and recorded. Care should also be taken in situations where the holders of rights are absent or have emigrated.

Some groups within a society can require extra support because they experience additional barriers to first registration. For example, women, ethnic, linguistic or religious minorities, and other marginalized or vulnerable people can face legal, cultural, financial and other forms of barriers to engaging in the process. Steps can be taken to address the participation of women and these same approaches can be adapted for other groups. For example, the registry or its contractor should:

- ◆ carry out awareness raising and training with officials and staff so that they understand the barriers that women face, the special steps that are required, and how they can overcome those barriers;
- ◆ ensure that procedures include steps to protect the rights of all, that there is room on forms to record all holders (not just the head of household) and that matrimonial parcels are recorded in the names of both spouses;
- ◆ employ a mix of male and female staff to work with the holders;
- ◆ develop and deliver information sessions for women and ensure that women are targeted in any communications activities and publications;
- ◆ employ women's advocates who act as intermediaries between women and the registry staff or contractor; and
- ◆ take into account the restricted time available to women and adjust working hours accordingly.

Identifying parcels: Parcels should be identified with sufficient care to avoid gross misrepresentation and confusion, but high spatial accuracy is not needed and parcels can be represented on parcel index maps (see [Parcels](#) in chapter 3). The process for the first registration usually results in all parcels having the same standard of quality, i.e. without any differentiation. However, there can be an option to identify parcels that meet some but not all the standards and to annotate the record accordingly. For example, when New Zealand introduced a title system, it allowed for a "limitation as to parcels" on titles where the existing surveys were of a lower accuracy than the standards in place at the time of the conversion. However, many owners did not have their parcels resurveyed to remove the limitation from the titles, which suggests that the perceived lower quality of information did not affect the use of the parcels.

Another issue concerns discrepancies between documented and measured areas. In some states, problems have occurred where the legal recognition of a parcel area is

given to the area that was specified at the initial allocation of the parcel (such as during privatization) even if the calculations were rudimentary, and the more accurate measurements made during the process of first registration are disregarded. This discrepancy has resulted in the creation of inaccurate parcel maps. For example, where the parcel size calculated during first registration is greater than that recorded in the initial allocation, the registry is forced to create a new fictitious parcel for the excess area. A better solution is to adjust the parcel records so that they reflect the reality on the ground, and this approach may need to be established in the law before systematic registration begins.

Finalizing the process: The team of specialists prepares a report on the findings, which are checked for accuracy and compared to other information (such as local government records, tax receipts) in order to identify fraudulent claims. The decision on the holders of rights to the parcels and the location of boundaries should be made by the relevant body, such as a commission. Often the decision-making body consists of a lawyer, surveyor and administrative assistant, and the inclusion of members of the community can be particularly important for the adjudication of customary rights.

There should be a public review of the decision on the holders, rights and parcels. The results should be published and people should be encouraged to review them. The public display of the results in the community can help to ensure that the records correctly reflect the rights of all, and to help ensure that any fraudulent claims are identified. The simultaneous mapping of the parcels of a community allows community members to review all the claims for parcels at the same time. Digital versions of the parcel maps overlaid with satellite imagery can be projected on screens or walls, using a generator for electricity if needed, during meetings with the community, and the feedback can be used to improve the quality of the parcel maps.

The review should allow for a formal process for people to appeal or object to the results, and assistance should be available to the poor and other special groups so that they are able to take action effectively. After the period in which people can appeal, the objections are resolved and the results are recorded. Once the work is complete, there is often an official declaration that the work has been finalized and, in some states, a certificate is issued to each of the holders of rights.

► inheritance, failure to record the discharge of a mortgage and failure to pay property tax or other dues. Depending on the legal basis of the state, corrective actions might be needed through administrative or judicial channels in order to rectify the situation and improve the quality of the right.

Changes to holders: In the case of a change of name (including marriage, divorce or restructuring of a company or trust), it is important that there is a simple administrative means for people to update the name that is shown in the records. This can be done using a form on which people show their former and new names, and they supply evidence of the change (such as a marriage certificate, divorce order, court order, deed for change of trustees). This is not a transaction (such as a sale or lease), but rather an administrative change to the register. The same applies to the change of gender where the law permits such change and its recording in the registry. Changes to the registry's records of holders can become automatic in cases where there are linkages to the civil registry and the companies registry, and with the use of unique identifiers for both physical and legal persons.

Changes to parcels: Subsequent registrations, such as for sales, leases and mortgages, usually do not require any updates to the parcel information. Instead, the parcel remains constant and it is the holder who changes. However, there are two situations where the parcel records need to be updated and the parcel index map should be updated to reflect these changes.

One situation is the consolidation or amalgamation of parcels. A person who holds two or more contiguous parcels can decide to combine them into a single parcel. For example, the person might want to erect a building that would otherwise cross the boundary line. The simplest approach is an administrative procedure where the map or plan shows a new parcel which has the outer boundaries of the contiguous parcels; in effect the inner boundaries are erased. There should be no need for a field survey and the use of the already approved map or plan for the original parcels should be sufficient. The unique parcel identifiers of the original parcels should be retired and a new parcel identifier should be created for the newly consolidated parcel. The consolidation of parcels sometimes affects other rights, such as easements and servitudes, and rights of way that arise through customary tenure. For example, a right of way on one parcel to benefit the adjacent parcel can be extinguished where the two parcels are consolidated.

The consolidation of contiguous parcels under the same ownership usually takes place sporadically when driven by the interests of individual owners. However, it can take place systematically through government

projects in the form of land consolidation in rural areas (in agricultural and forested areas) and readjustment projects in urban areas.

The second situation is the subdivision of parcels, which can range from a simple case of splitting one parcel into two through to a complex case of splitting a large parcel, such as a farm, into hundreds of parcels for housing. In some cases, several parcels can be first consolidated into one large parcel, which is then subdivided into new parcels because the consolidation into the single large parcel can allow for a better layout of the new parcels and infrastructure. Subdivisions commonly require regulatory approval before the subdivision takes place and the new parcels are recorded, and the registry typically requires the document stating that approval is granted before the new parcels are recorded. Where a parcel is subdivided, the registry should retire the parcel identifier and assign new numbers to all the newly created parcels.

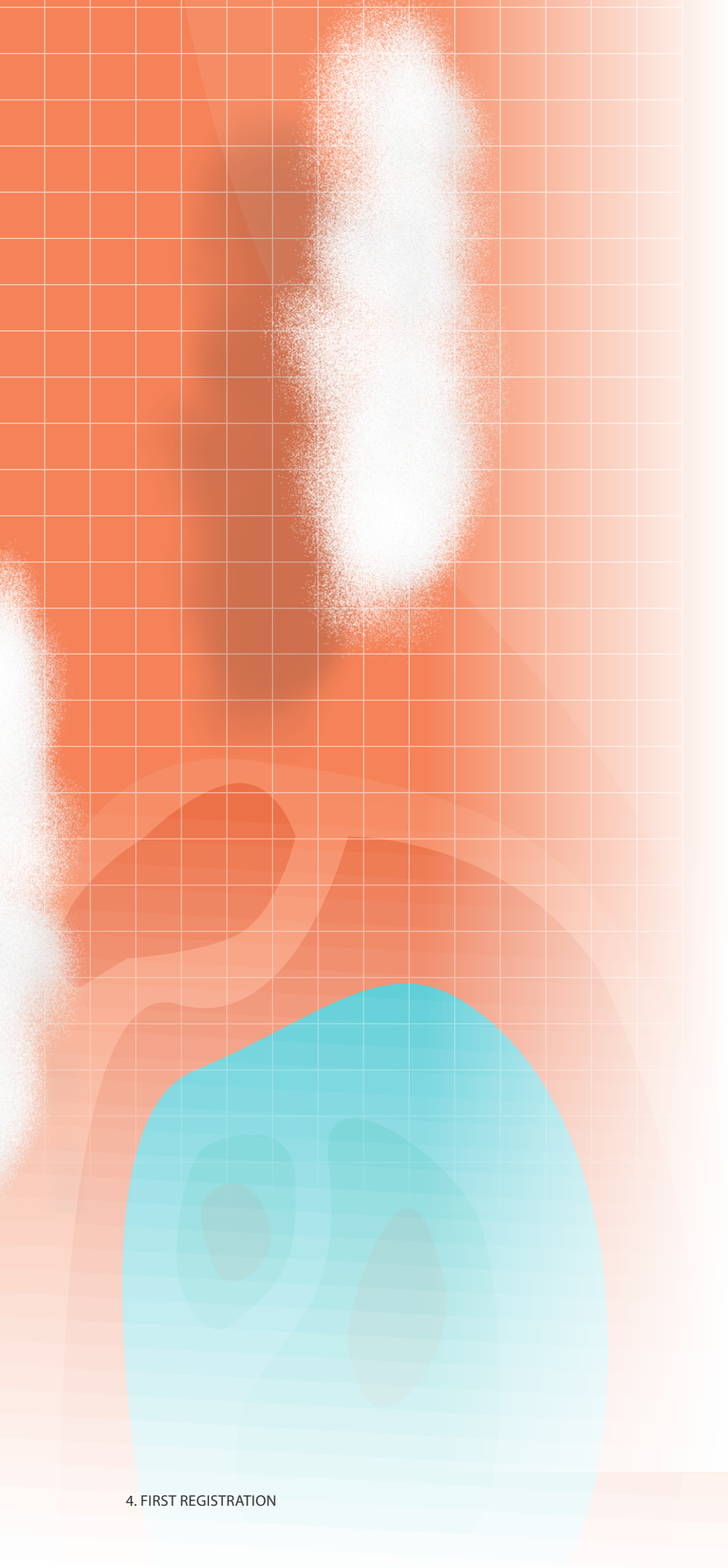
Subdivisions can affect other rights such as easements and servitudes and other types of rights of way, particularly those that affect only a portion of the original parcel. In such a case, an easement or servitude can affect one of the new parcels but not another. Knowledge of the location of existing easements or servitudes can simplify the task. For example, in the case of a servitude that applied to only a portion of a parcel, an earlier practice in the Netherlands was to record the existence of a servitude against a parcel without identifying the specific portion. When the parcel was divided, the relationship between the new parcels and the servitude was not clear, and so the procedure was adapted. Subdivisions can also require the creation of new easements or servitudes, such as to provide access to new parcels or for utility lines.

ADDITIONAL INFORMATION

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Improving ways to record tenure rights



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Improving ways to record tenure rights

This guide is available
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The creation of a new recording system requires thinking about how the system and registry will operate. The list of issues that will need to be addressed could appear endless and this chapter is limited to addressing only some of them. It reviews the institutional arrangements, the legal base for the system, the functions and qualifications of registrars, the examination of information before it is recorded, how the records can be organized and stored, and the balance between public access to information and the privacy of individuals.

Other issues relevant for the design are covered in the companion guide on [*Improving ways to record tenure rights*](#). They include development of a customer focus, design of offices, management arrangements, staffing and training, reducing opportunities for fraud, mistakes and disputes, and the introduction of ICT.

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5. SOME CONSIDERATIONS FOR THE DESIGN OF A NEW RECORDING SYSTEM

Key points of this chapter

- ◆ There is a range of institutional arrangement options for a registry, and while all can work, experience has shown that an independent, stand-alone registry can work best.
- ◆ When designing a new system, there are various approaches to how it can work, including evidentiary or conclusive approaches, constitutive or declaratory approaches. There is no “best” approach, so states need to assess which approach is most suitable to local needs and conditions.
- ◆ Registrars play a central role in any recording system, and they need to be adequately qualified, honest, independent and protected from claims for compensation when mistakes occur even though they have discharged their duties professionally.
- ◆ To ensure the integrity of the recording system, information must be checked. The system can rely on professionals who work with the public to provide one means of checking, but the registry must also conduct its own checks.
- ◆ The registry can encourage people to report mistakes and other problems with the records, and it should provide a simple process for them to do so.
- ◆ Registry records should be based around the parcel, which has a unique identifier. All transactions should refer to that identifier.
- ◆ The archive and its documents are a cornerstone of the registry. There are numerous considerations for protecting documents, storing documents and providing access to documents.
- ◆ Finding the balance between privacy and public access to registry records is difficult and ICT has increased the risk to protecting privacy. Each state will reach a different conclusion on how to deal with these two conflicting principles.

INSTITUTIONAL ARRANGEMENTS

Registries are most commonly government bodies that follow the traditional model of a service provider that is funded and staffed by government. There are various possible ways in which registries can be located within government, with the choice of approaches being based on historical, administrative, political or other factors. The three main possibilities are:

- ◆ Stand-alone agency, which reports directly to the minister, the prime minister or the cabinet of ministers.
- ◆ Part of a ministry, such as a department or an office for recording. For example, land registries are often grouped together with bodies responsible for state land management, surveying, valuation and other land-related activities. The registry reports directly to the head of the ministry and the minister.
- ◆ Part of a body within a ministry, such as a division or unit. For example, fisheries registries are sometimes part of the fisheries management agency, which, in turn, might be part of a broader ministry for natural resources. Such a division or unit reports through the agency to the head of the ministry and the minister.

In addition, there are some cases where the private sector provides recording services (in a public-private partnership) or some aspects of the services. Typically, the registry cooperates with a private enterprise to introduce reforms (such as introducing ICT), and the fees are used to pay the private enterprise for the services it provides. Most partnerships operate like a concession in which the private enterprise takes over delivery of the service in exchange for fees for a set period of time.

While there is no best practice, experience has shown that an independent status is often advantageous to a registry. Such status allows the registry to control its own budget, particularly if it is able to retain at least some of the recording fees. Further, as technology is made available for various agencies to share information quickly, easily and cheaply, the need to group agencies covering a specific area of tenure resources is reduced. Regardless of the approach, the registry should be free from political pressure (see the companion guide on [Improving ways to record tenure rights](#) for financial and other management matters).

CHOOSING THE WAY IN WHICH THE SYSTEM WILL OPERATE

Designers of a recording system have a number of choices regarding the way in which the system operates (see [Choices in the design of outcomes](#) in this chapter). A fundamental consideration concerns the situation when a transfer of rights takes place. One

option is for the law to state that the transfer occurs only by the act of recording the transfer document at the registry. There is no way that rights can be acquired except through recording. Such systems are called “constitutive”. Another option is that transfer occurs with the execution of a contract between the two parties; for example, by signing an instrument of transfer such as a deed. Recording is not needed to acquire rights. Systems that operate in this way are referred to as “declaratory”.

A second consideration is to do with the status of the records created as a result of the recording. Several variations are possible. One option is that the records provide evidence that establishes a presumption or default position as to which a person holds certain rights to a parcel. Anyone who disagrees has the burden of proof and needs to provide evidence to show that the records are wrong. Systems of this type are called “evidentiary”. An alternative is that the records provide conclusive proof as to the existence of a right, the person who holds it and the parcel to which the right applies. These systems are referred to as “conclusive”.

Selecting a “conclusive system” still leaves designers with several choices. In a conclusive system, the record is indefeasible and cannot be overturned. However, even with an indefeasible system, there are options. One approach is that the record becomes indefeasible immediately after the transfer takes place: this is the rule of “immediate indefeasibility”.

But what happens in cases where the transfer and recording were based on documentation that was forged or otherwise invalid? In systems with immediate indefeasibility, the new rights can still be regarded as conclusive. Other systems try to address this situation by using a rule of “deferred indefeasibility”. In systems with this rule, the record is not indefeasible if the transfer was based on a forged document. However, if the person who acquired the right then transfers it to someone else using a valid document, the record of the new transfer will be indefeasible: indefeasibility is deferred to the record of the person who acquired the rights through a transaction that was not fraudulent.

There is yet another variation possible for conclusive systems. This approach provides for records to be indefeasible except in certain situations, such as if the documentation is invalid, the holder does not have the legal right to transfer, or if the acquisition was illegal for some reason. In such cases, the records are not indefeasible and can be overturned, and there is not a temporary limitation, such as with the case of deferred indefeasibility.

These variations of constitutive, declaratory, evidentiary and conclusive approaches can be found in well-functioning systems around the world. No single type is inherently correct and better than the others.

All types of systems should provide services effectively

and efficiently to their customers but no system is immune from problems. All systems will encounter mistakes and fraud: in well-functioning systems they will be infrequent but they will occur nonetheless. Problems such as fraud can mean that a person loses a parcel while another buys that parcel in good faith. Which of these innocent parties gets to keep the parcel? In making choices, designers should consider two issues.

First, the rules selected for the new system must be acceptable to the public. The matter of which party, an innocent owner or an innocent buyer, gets to keep a parcel is not technical and there should be an informed public discussion on the proposed rules for the system. Second, the registry and state should determine what liability it should assume. Is it necessary for the registry and state to provide a guarantee on the quality of the records? What is the liability for paying compensation when people suffer a loss as a result of recording? What can the state afford to pay and how should this be done? Third, the rules must conform to the legal tradition and institutions of the state.

The differences in rules in a system (such as constitutive, declaratory, evidentiary and conclusive) can produce different outcomes for the same situations. Systems that look similar can produce different outcomes in the same situation, and systems that look different can produce similar outcomes. Designers should understand the implications and ensure that the rules of the new system are appropriate for its setting (see [Choices in the design of outcomes](#) in this chapter).

REGISTRARS

Decisions are also required for those establishing systems about who will run the registry, what will be their roles, powers and qualifications, and other special considerations, such as their liability for mistakes.

Chief registrar: The chief registrar has the responsibility of running the registry. Traditionally, the chief registrar had experience as a registrar, with proven capacity and thorough knowledge of how the registry works. Increasingly, people appointed as chief registrar have experience in management, such as professional managers or economists. This reflects the executive role of the head of the registry. Rather than have specialists in charge, a manager can approach the registry as a business operation that must have a customer focus if it is to be sustainable. In other systems, the chief registrar is a political appointee, sometimes without much knowledge or experience as a registrar, and that person changes when the government changes. The chief registrar has a range of responsibilities to manage and lead the organization, ensure that the registry meets its

targets within its budget limitations, approve instructions and forms, and represent the registry in public and before politicians. Some systems provide for the chief registrar to delegate his or her decision-making authority to the registrars.

Roles and powers of registrars: Registrars occupy a special role in systems because they are the ones who authorise changes to rights. While each system varies, the function of the registrar to check, investigate, apply the law and make a decision regarding each application is similar throughout the world. In some systems, the registrar is similar in nature to a judge and has a seal, identity number and other indicia of office. Where the legal system requires that the powers of officials be listed in the law, then it is necessary to specifically list the powers of registrars. If possible, additional powers can be added by way of ministerial order or regulation. These basic powers should be supplemented by powers to reject applications that do not comply with the requirements, make corrections (if specific conditions are satisfied) and certify documents. In other legal systems, particularly common law systems, the powers of registrars need not be specified in one place, but each of the provisions of the law should make it clear what the registrar is entitled to do. The powers of registrars need to be closely monitored and revised from time to time so that they are kept up-to-date with new services and new technology.

Often, the simpler or more common types of applications are handled by a deputy or assistant registrar, who sometimes has not completed his or her studies or who has not passed the necessary examination. Alternatively, non-legally qualified people sometimes handle the common types of cases, after they have received specialist training by the registry, and if any problems arise, they refer them to the registrar. In terms of efficiency, it is usually more cost effective to have a small number of registrars who supervise assistants.

Qualifications of registrars: In many systems, registrars are law graduates with a certain number of years of practical experience. Some registries require the applicants to pass a special registrars' examination. In other systems, the person performing the functions of the registrar is a judge. In yet other systems, registrars do not have degrees in law but have passed specific government civil service examinations on becoming a registrar. In any case, it is important that the registrar knows both the laws and the practice of the registry, and each state can take its own approach to how the necessary minimum standards can be achieved. Ongoing training requirements must also be kept in mind.

Special obligations: Given the special place that the chief registrar and registrars occupy, it is important that the public have confidence in them. Consequently, some states impose certain additional obligations on

registrars. In Rwanda, for example, the registrars are obliged to disclose their assets and take an oath of office at a public ceremony. This must be repeated every year. Where the registrar is a judge, then he or she would be subject to the same obligations as other judges.

Independence: The issue of whether registrars are independent of the chief registrar, other registrars, other officials or members of the government is relevant to their ability to make decisions as they see fit. Independence in decision-making is an important way of ensuring that registrars are not influenced by external factors, such as political or economic influences that could be exerted by their superiors and that have no place in determining whether an application can be recorded or not. To this extent, independence is a good thing.

However, registrars should not be free to make any decision that they like. Problems arise where there are different interpretations of the law, with registrars taking different views. This can result in similar cases being treated differently. The chief registrar should publish clear directions on how the registry as a whole is to interpret the law, with the directions being developed by a group of well-respected and highly experienced registrars, so that their view is convincing to other registrars. All registrars should be obliged to follow these directions. The resulting consistency in the system, with similar cases being processed in a similar way, can build public confidence in the system. The directions will need to be revised over time as new cases and new laws emerge. (See chapter 7 of the companion guide on [Improving ways to record tenure rights](#) for information on a procedures manual).

Another issue is whether registrars, and particularly the chief registrar, should be political appointees. In this context, their independence is from the politicians who make up the government. States take different approaches to this question, with some appointing a new chief registrar each time the government changes, and in other states the registrar is elected locally. Alternatively, many states regard the registrars and chief registrar as independent apolitical appointments, and the government will remove them only for misbehaviour or negligence. Sometimes the law will contain a provision guaranteeing the independence of the chief registrar although a government could ignore this in practice. The most efficient approach, and the one that keeps political concerns at arm's-length, is to have a fully independent system of registrars. This approach treats them in the same way as judges, and it assists with developing public confidence in them and their decisions. It also means that the chief registrar should be a knowledgeable and experienced person, making trustworthy decisions

that are not affected by day-to-day political considerations that have no place in a registry system.

Liability: In some states, the registrar is personally responsible for the consequences of his or her decision. If the registrar makes a mistake and someone suffers a financial loss as a result, then the registrar can be personally liable to pay the compensation. The philosophy behind this approach is that registrars will be careful to carry out their duties without any mistakes if they know they could face financial penalties. However, this approach leads to registrars being excessively and unnecessarily cautious when investigating applications and making decisions. They can sometimes call for extra documents and further evidence to protect themselves from any claim that they did not take all the necessary actions. This has a negative impact on efficiency for both the registry and the customers; it increases delays and is frustrating for customers. Such inefficiencies can even have a negative impact on the economy.

A better approach is to hold registrars (and other staff members) personally liable in limited circumstances, particularly where they really were at fault, and for the registry to cover other cases where a person suffered a loss due to a mistake. Under this approach, a registrar would be personally liable where the mistake (or omission) was made:

- ♦ on purpose (*mala fide*); or
- ♦ in carrying out an activity or duty that was outside the activities or duties that the registrar was authorized to do; or
- ♦ due to a grossly negligent departure from following the laws, rules and procedures, or without regard to the laws, rules and procedures.

The registry could be obliged to pay compensation in all other cases, such as where the registrar followed the law, rules and procedures, but something still occurred that resulted in a person suffering a loss. Further, the registry should fund the reasonable costs of legal representation of any registrar or staff member against whom a claim for compensation is brought based on a mistake allegedly committed in the course of his or her authorized duties.

EXAMINING INFORMATION BEFORE IT IS RECORDED

The information in the system must be reliable if people are to have confidence in it. Examining information that enters a system helps to ensure the quality and accuracy of the system's records. How applications are examined depends on the legal framework (for

example, whether notaries play a role) and the way in which the system operates (for example, whether the system is evidentiary or declaratory, and whether the state provides a guarantee and compensation). Regardless of the examination process, the registry should be required to receive applications and provide a time-based stamped receipt so that the person applying has evidence that the registry has received the application.

Examination of applications should be based on some form of risk analysis. The “right amount” of examination should be performed. Without any examinations, fraudulent, frivolous, incorrect and incomplete documents can be submitted for registration. However, if examinations are too precise, they can become time-consuming and expensive. If high transaction costs discourage heirs and other subsequent holders from seeking formal recognition of transfers, then over time the system will become outdated. As a result, the quality of the information in the registry will decrease precisely because the attempts to ensure quality require inappropriate levels of examination.

In a simple transfer of a parcel from one person to another, checks such as the following should be required:

- ◆ Proof of the holding of rights: Is the seller identified as the owner of the parcel?
- ◆ Proof of identity: Is the person who claims to be the seller actually that person or has the identity been stolen?
- ◆ Formal requirements: Do the documents submitted for recording fulfil the formal requirements of the law; for example, is a document signed and witnessed?

Examinations in the registry

It has long been standard practice for registries to establish the identity of people in transactions but the matter is receiving greater attention in some states as a result of government programmes to combat mortgage fraud, money laundering and terrorism. At the same time, the relative ease with which false documents such as driver’s licenses can be acquired is making the identification process more difficult. How information is examined depends to some extent on its nature.

In conclusive systems, such as title systems, the registry provides conclusive proof as to the holder of the rights, and these systems often provide compensation for losses arising from the recording of rights. As a result, the registry carries out substantive examinations on transactions to ensure that only valid transactions are recorded. The level of examination often depends on the complexity of the transaction. There has been a

trend to simplifying matters so that much of the examinations can be carried out by administrative staff who work under the supervision of registrars.

In evidentiary systems, such as deeds systems, examinations within the registries are commonly limited to procedural matters, and a registrar will check only that the submitted document conforms to the legal formalities and that all necessary payments have been made. It is not usual for the substance of a document to be examined although this occurs in some states. In the Netherlands, for example, registrars are required to record all notarial deeds submitted to the public registry, although if a deed is considered to be suspect they have the discretion to add a warning in the parcel records (known as the cadastral administrative database).

Examinations outside the registry

Notaries: In states with a tradition of notaries, the task of examination is divided between the controls inside and outside the registry. There are examples of both deeds and title systems where the use of notaries is required by law. Only documents that have been prepared by a notary can be recorded. Requirements vary between states but, in general, a notary is a person trained in law who is appointed by the state and is under the jurisdiction of the Ministry of Justice. The notary typically examines the proof of ownership of the seller, the proof of identity of the buyer and seller, determines their legal capacity to transact and prepares the deed of transfer so that it is legally valid. The notary has a responsibility to ensure that the documents submitted for recording fulfil the requirements of the law. The notary prepares the sales contract upon which the notarial deed of transfer will be based, but because the notary is expected to act impartially to both buyer and seller, it is common for buyers in some states to use lawyers to ensure that their interests are protected in the sales contracts.

Other professionals: In a number of states it is possible for the owner to prepare the documents of transfer and submit them for recording. However, in practice, most transactions in such states are prepared by professionals such as lawyers or other people who are licensed for the conveyance of rights. For example, England and Wales in the United Kingdom of Great Britain and Northern Ireland and some Australian states allow people who are not lawyers to qualify as licensed conveyancers who are authorized to handle transactions, and in Sweden it is common for licensed real estate agents to prepare contracts. In all these cases, it is the professional responsibility of those who are licensed for the conveyance of rights to ensure the validity of sales contracts and to check that the seller is the holder of rights.

In developed economies, almost all transactions are prepared by professionals. This is compulsory in some

states (where only documents prepared by notaries can be recorded). In other states where citizens are allowed to prepare and submit documents for recording, this is seldom done; instead, the parties use professionals to assist them. There are a number of reasons for this: for the average person or family, transactions involving parcels occur infrequently (a person typically purchases a small number of houses in a lifetime); the transactions have a high cost (for most people, the purchase of a house is their single largest investment); and the laws and procedures can be complicated. The cost of these professional services is usually a small percentage of the upfront costs of a transaction such as buying a house (for example, a down payment or deposit of the purchase price as a requirement of getting a loan, other upfront costs of obtaining the loan, transfer taxes or moving costs). Also, the cost of the professional services is small compared to the cost if things go wrong, and as professionals are usually required to carry insurance for cases where things go wrong, using a professional is a type of insurance. The use of professionals helps to ensure the quality of information.

In many developing economies, there are few professionals, particularly in rural areas, and where they exist, their costs can be high relative to the value of the parcels. In such states, there is a tendency for people holding or acquiring rights to deal directly with the registries. This approach can be successful, but the burden for ensuring the quality of the information falls entirely on the registry staff. The provision of legal aid, including through paralegals and parasurveyors, can greatly help people with their transactions and can also assist with ensuring the quality of the information.

USING THE PUBLIC TO IMPROVE THE QUALITY OF INFORMATION

Voluntary approaches: People can be encouraged to report mistakes and other problems with the records, and a simple process for doing so should be provided (see [Beyond first registration](#) in chapter 4). While these examples are of first registration, the approach can be a permanent feature of registries. Public feedback can continue to be encouraged after the start of subsequent registrations.

Compulsory approaches: In some states the long-held principle of “caveat emptor” (let the buyer beware) has been moderated by the movement towards increased consumer protection. This means that in these states, sellers (and sometimes the professionals assisting them) have to disclose matters related to tenure when they sell a parcel. Failure to disclose all the necessary information prior to the transfer of the parcel can result in

the buyer later suing the seller for misrepresentation. Tenure-related matters for which disclosure is required in some states includes: the existence of disputes with neighbours over boundaries; actual or potential claims against the parcel; unrecorded easements/servitudes or leases; whether all alterations to buildings conform to the building code; and whether notice has been given for the development of neighbouring parcels. The sellers might also be required to provide information on matters not related to tenure, such as flooding and other recent damage, soil contamination and other environmental conditions. To speed up the buying process, some states also require the seller to include local government planning information and diagrams showing utilities.

ORGANIZATION OF THE RECORDS AROUND PARCELS

All systems need well-organized records to function well. Such records enable people to quickly and easily identify who holds rights to a parcel and to carry out transactions. They also reduce the chance for fraud and mistakes and so increase confidence that the information is reliable. In contrast, ambiguous and confusing records make it difficult to find the information needed for a transaction. If fraud and mistakes are common in a system then offering compensation is not sustainable as the amount to be paid out is likely to be higher than what can be afforded. Reducing mistakes and fraud and reducing the time and costs of recording are not necessarily trade-offs. Both can be achieved in large part by organizing the records around parcels.

Organizing records around parcels means assigning a unique identifier to a parcel. The parcel identifier can be a unique parcel number assigned as part of systematically creating an inventory of all parcels, or it can be a unique certificate number where recording takes place sporadically.

A unique parcel identifier allows all transactions to be listed against the record for the parcel. Using the identifier on all records for the parcel allows all rights to it to be quickly and easily identified and makes any gaps or competing claims visible. The record for each parcel can be created using its identifier and the information on the parcel that exists in documents and maps of the registry. In title systems, the information on a title certificate identifies the parcel, the owner and other rights and their holders if they exist in the cases of mortgages, leases and easements. This can also be done for deeds systems, where the same information can be abstracted from recorded deeds and shown in an accompanying parcel-based computer file.

ARCHIVES

First registration, as described in chapter 4, is not a stand-alone activity and the information collected needs to be managed so that it can be used in day-to-day operations of the registry. This section focuses on paper documents and the companion guide on [Improving ways to record tenure rights](#) addresses the introduction of ICT and the creation of digital archives.

The information is stored in the registry archive, which usually includes documents (deeds, titles, sale contracts, leases, mortgages, court orders, inheritance certificates) and plans and maps showing parcels. Other administrative documents that are relevant to the system are also kept in the archive, such as old indexing books. These records of past transactions and the locations of parcels can be required when new transactions are to be recorded or a dispute arises. Evidence is needed that the person dealing with the parcel has the authority to do so, and that the parcel in question is the correct one. In many systems, particularly deeds systems, the last recorded document will be requested in order to make decisions or prepare new legal documents. Where a dispute arises, often the first thing to do is check the history of the parcel and the associated rights using the archive records.

As the number of parcels and transactions increase, there will be increasing demands for storage space and increasing costs for space and the staff to manage the archive. The following considerations should be taken into account with regard to paper archives:

- ◆ Continuity plans should be prepared for potential disasters that impact the registry; for example, recovering and providing access to the records in the event of a disaster. Some form of copy of the records should be kept in case of loss.
- ◆ The number of documents that are archived increases rapidly and it is important to ensure that facilities are sufficiently large for the projected number of files and other records. The space and projected increase in file numbers must be assessed annually to ensure that there is sufficient space for the near future. In 2011, an analysis for Croatia, with a population of 4.2 million people, estimated that a building with 5 000 square metres would be required to store relevant paper records.
- ◆ Documents are heavy and floors need to be reinforced. Ground level or underground facilities are often preferred but these locations should be safeguarded against flooding, dampness and infestations of animals and insects.
- ◆ Archives need to be protected from fire, vermin and natural deterioration. This requires the use of non-flammable storage shelves and the availability of fire extinguishers or more sophisticated firefighting

equipment if the funds are available. No smoking, eating or drinking should be allowed, and the archive should be climate-controlled to avoid the impact of damp and mould. The archive should be kept clean, and floors kept clear of debris, such as old furniture and old files.

- ◆ Compactor shelving helps to save space but it is also important to ensure that walkways are sufficient in size. Compactor shelving often requires reinforcement of the floors due to the weight.
- ◆ Archives should be located far from areas that are prone to flooding or other natural disasters.
- ◆ Registry offices are often located in major centres for ease of access by large numbers of people, but office space in these areas is expensive. Files that are recent or in regular use can be stored at the registry in a specialized archive area, but records that are old or rarely used should be stored in another location (known as off-site storage) where the costs are lower. For example, the off-site storage for the national archives of the United Kingdom of Great Britain and Northern Ireland is a salt mine where the temperature is constant at 14 degrees Celsius, with humidity always at 60 to 65 percent. These are perfect conditions for archives.

In paper-based systems, it is important to develop a policy for disposal of records. Many records include supporting documents, such as the photocopy of an identity document, internal memos or statements that tax has been paid. Such documents become irrelevant with time and need not be kept.

PUBLIC ACCESS AND PRIVACY

An important aspect of recording rights is to give publicity to them. Improving the delivery of services of a registry typically means providing improved access to the information and, increasingly, it has involved the cross-referencing of indexes (such as those related to taxation and public security) and linkages to other registries (such as to the civil registry and the companies registry). However, improving access to information has been accompanied by increased concerns about privacy.

Most registries allow anyone to search by a parcel reference, such as the unique parcel identifier, plan reference or similar identifier and to see the details of the parcel as well as the holders of rights.

There is much greater variety with regard to searching for information by the name of the holder. For example, the name of the holder can be used to search for records in countries as diverse as Australia, France, the Netherlands and the United States of America. However,

other states place different degrees of control on such searches. In Sweden, it is not possible to search using the name of a person. If someone wishes to get a secured loan, he or she must provide the lender with the parcel identifier in order for the lender to inspect the registry records. Germany restricts the ability to search using the name of the person to cases of legitimate interests; for example, if a lender wishes to check the rights of a person who has applied for a loan. In England and Wales in the United Kingdom of Great Britain and Northern Ireland, it is possible to search using the name of a legal entity such as a company or government agency, but a search using the name of a private individual can be carried out only by the owner, an agent of the owner, a person with a demonstrated interest (such as a trustee in a bankruptcy) or through a court order.

Some states restrict access to information on the holders of rights. In Mongolia and in Kuwait, for example, a search using the parcel identifier will show information only for the parcel and will not reveal the owner's name and other details, and it is not possible for the public to search for information using the owner's name. Only with the owner's consent can anyone other than the owner see the details of a person's holdings, although courts or law enforcement officials can have access to this information.

In all states, not all the information in a system is available to the public. Even states that allow for information to be searched using a person's name make a distinction between information that can be disclosed to the public and information that is considered to be private. For example, some states have acted to remove information of a personal nature that can be used in identity theft. Other states permit public access to the parcel and the name of the holder, but information about subsidiary rights (particularly mortgages that contain personal financial details) cannot be given out.

The disclosure of mortgage details is a sensitive matter. The reforms to recording loans secured by personal property (i.e. movable property) in the United States of America provide the example of "notice-based" financing that has also been used in recording tenure rights: what is recorded are not the details of the security agreement itself, but rather a simple notice that the party identified as the lender may have a security interest in the collateral described. One practical aspect is that the loan value stated in the mortgage document is usually accurate only at the time of recording: the actual amount of the debt decreases over time as the borrower pays off the loan.

Other deterrents could be used to discourage the searching of records by people who do not have a significant interest in them. Some states permit an owner to see who has been making enquiries about his or her

rights and parcels. Many registries charge a small fee and require the person to complete an application form in order to carry out a search. They also usually require separate applications for each parcel being investigated.

Historically, access to the systems required an effort, with the person having to visit the registry office, submit a request for information at the counter and then receive copies of the requested documents. The information, while public, was typically accessed by only a small number of people. The use of ICT has brought significant benefits but it has allowed large amounts of information to be viewed by just about anyone in the world without physical constraints, and the ease with which information can be searched from a distance has raised increased concerns over privacy. Advocates of privacy complain that anyone can discover personal information regarding rights to assets including the details of the transactions, such as the price paid for the assets.

As a general rule, greater access to information facilitates transparency and, on balance, most states consider that privacy comes second to having an open, transparent record of rights. However, privacy should be kept in mind, particularly if someone can find personal details such as a home address from the records. Ultimately, decisions about what information to release are usually not based on the principles of recording rights but are a response to the requirements of legislation that govern the freedom of information (i.e. the right of people to access information held by the government) and privacy (i.e. the right of people to prevent the government from releasing their personal information that is contained in government records).

CHOICES IN THE DESIGN OF OUTCOMES

Recording systems are designed to do the same thing – to provide a public record of rights – but they manage to do it in strikingly different ways around the world. People who want to set up a system have a range of choices before them, as the following discussion shows.

One variation relates to ways to demonstrate the proof of rights. Systems can be evidentiary or conclusive:

- ♦ **An evidentiary system** provides evidence of the right and who holds it. Recording shows that a transaction has occurred, with the evidence being documents such as deeds of transfer. Proof of ownership is in the form of a “chain of title” that shows the historical sequence of transfers from one person to another.
- ♦ **A conclusive system** provides conclusive proof as to the existence of a right and the identity of the person who holds that right. Proof of ownership is often in the form of an entry in a register.

Another variation relates to ways to acquire rights. Systems can be constitutive or declaratory:

- ♦ **In a constitutive system** the transfer of rights takes place upon recording. A right cannot be acquired except through recording.
- ♦ **In a declaratory system** the transfer of rights takes place when parties execute a contract. Recording provides some protection; for example, a recorded claim to a right may take priority over an unrecorded claim to that right.

These variations have been combined in a number of ways for land registration systems as shown below.

These types of systems exist in many states around the world, and so the following list and review could have identified a number of other states, both developing and developed, instead of those states that have been identified: Australia, Denmark, England and Wales in the United Kingdom of Great Britain and Northern Ireland, Finland, France, Germany, Netherlands, Spain, Sweden and the United States of America. These states have been identified in order to illustrate that even states with similar social, political and economic settings have chosen different systems; the existence of a particular system in a state is not dependent on the particular conditions of that state. A second reason for identifying these states is that their systems can be considered to function well; the success of a system is not necessarily dependent on its type, and good deeds systems can function as well as good title systems.

- ♦ **Constitutive and conclusive systems** (e.g. Australia, England and Wales in the United Kingdom of Great Britain and Northern Ireland and Germany). Transfer takes place upon recording of the transfer document and the resulting entry in the register provides conclusive proof of ownership.

- ♦ **Constitutive and evidentiary systems** (e.g. the Netherlands). Transfer takes place when the deed of transfer is recorded. Being evidentiary, the records show that a transaction took place but a person should not rely entirely on information in the system as a flaw in a transaction may affect whether a right was transferred. Being constitutive, a person can assume that transactions that are not recorded do not have to be taken into account.
- ♦ **Declaratory and conclusive systems** (e.g. Spain, Denmark, Finland and Sweden). Transfer occurs when the buyer and seller execute a contract. Recording is declaratory but it can be done only if the buyer acquired the rights from the person identified as the owner in the system. (In Spain, the system is declaratory for transfers of ownership and leases but constitutive for mortgages as they require recording in order to exist).
- ♦ **Declaratory and evidentiary systems** (e.g. France and the United States of America). Transfer occurs when parties execute a contract. Recording does not create ownership but gives a presumption that the person recorded as the owner is, in fact, the owner.

TYPE OF SYSTEM	CONSTITUTIVE	DECLARATORY
Conclusive ("title systems")	Australia, England and Wales, Germany Spain (for mortgages)	Denmark, Finland, Sweden Spain (for transfers)
Evidentiary ("deeds systems")	Netherlands	France, United States of America

All systems tend to give the same results in two situations. The first is where there are no problems: the rights of the seller are not challenged, the transaction is in good faith and all requirements for the transfer are fulfilled. All systems will recognize the buyer as the new holder of the rights, either conclusively or as a presumption. The degree of protection depends to a large degree on the entire legal system of the state, as the law of recording rights is not isolated from other legislation. The second situation is where a person attempts to acquire the rights by committing a fraudulent act: systems typically do not recognize such transfers as being valid.

However, in other situations, systems that look similar can produce different outcomes while systems that look different can produce similar outcomes. The question of what to do with an existing system is not a simple technical matter of how to manage the records, but it also requires addressing what right holders think is the fairest outcome in situations such as when a person loses a parcel through fraud and another person buys that parcel in good faith. There is an innocent owner and an innocent buyer, and a system cannot protect them equally. Inevitably, one person wins and the other person loses.

Who wins and who loses depends on the rules of the system as the following examples illustrate. While most people are not devious and most recordings involve transactions

between law-abiding citizens, fraudulent transactions find their way to the registry. Fraud is carried out not only by strangers but also by people whom the victim trusts, such as family, friends, business partners or professionals, such as lawyers.

This section reviews a case of fraud where the original owner loses a parcel through fraud and another person buys that parcel in good faith: only one of these two people can keep the right to the parcel. In one type of title system, the outcome is to protect the new innocent buyer and to provide compensation to the original owner for the loss incurred. In another type of title system, the outcome is the opposite: the original owner is protected and the innocent buyer is compensated for the loss.

As a result, the design of a system should not be considered as a simple technical matter. Instead, it should be based on an analysis of the desired outcome in particular situations. For example, what do the people who currently hold rights think would be the fairest outcome if they lost their rights because of fraud?

Transfers of rights

The first example is that of a transfer of rights.

The system shows person "A" to hold the rights to a parcel. Another person "X" impersonates "A" and sells the parcel to a third person "B" who is unaware of the fraud. The transfer document is false because "A" did not sign it but the transfer to "B" is recorded. What happens if "A" discovers the fraud and takes action to recover the parcel?

The owner "A" is protected in deeds systems such as in France, the Netherlands and the United States of America. An invalid contract is not capable of transferring the parcel and so "A" has not lost the parcel and "B" has not acquired it.

In contrast, the buyer "B" is protected in some types of title systems, such as in Australian states and in England and Wales in the United Kingdom of Great Britain and Northern Ireland. The owner "A" has lost the parcel because these title systems provide an indefeasible title (i.e. the title is conclusive and cannot be overturned) through a rule of "immediate indefeasibility of title". The buyer "B" has an indefeasible title upon recording even if the transaction is based on documentation that was forged or otherwise invalid.

Other types of title systems protect the owner "A" as is the case in Denmark, Finland and Sweden. These systems provide a title that is indefeasible except under specific conditions:

- ◆ if the transfer document is false or has been signed by someone who was not authorized to do so, or was signed under a legally defined kind of threat;
- ◆ if the rightful owner is in bankruptcy, does not have legal capacity, or is mentally incapacitated; or
- ◆ if the acquisition is by law invalid because it has not been

enacted in due form or lacks the consent of someone whose rights are affected, or the permission of the court or another authority.

In yet other types of title systems (such as in Germany and Spain), the owner "A" is also protected as the transfers are considered to be invalid even if the buyer "B" conducted the transaction in good faith.

The following table illustrates the range of possibilities.

TYPE OF SYSTEM	CONSTITUTIVE	DECLARATORY
Conclusive ("title systems")	Australia, England and Wales: "B" is the owner Germany: "A" is the owner	Spain, Denmark, Finland, Sweden: "A" is the owner
Evidentiary ("deeds systems")	Netherlands: "A" is the owner	France, United States of America: "A" is the owner

A variation of the example produces yet another variation in the result.

As with the previous example, a person "X" impersonates "A" and sells the parcel to "B" who is innocent and unaware of the fraud, and the transfer is recorded. Another person "C" purchases the parcel from "B" and records the transfer of rights. What happens if "A" then discovers the fraud and takes action to recover the parcel?

For the deeds systems, "A" is still the owner because the number of transfers does not remedy the defect of the earlier false transfer document.

For the title systems of Denmark, Finland and Sweden, "A" continues to be the owner for the same reason.

For the title systems of Australia and England and Wales, "C" is the owner.

For the title systems of Germany and Spain, there is now a difference. These title systems operate under the rule of deferred indefeasibility: indefeasibility of title is deferred to the first buyer who relies on the records to determine the owner, and who records a transaction that is not fraudulent.

This is illustrated below:

TYPE OF SYSTEM	CONSTITUTIVE	DECLARATORY
Conclusive ("title systems")	Australia, England and Wales; Germany: "C" is the owner	Spain: "C" is the owner Denmark, Finland, Sweden: "A" is the owner
Evidentiary ("deeds systems")	Netherlands: "A" is the owner	France, United States of America: "A" is the owner

Mortgages

Fraud is often associated with mortgages and people have used many inventive schemes to enrich themselves through mortgage fraud.

The system shows person "A" to hold the rights. A second person "X" impersonates "A" and arranges for a loan from lender "D", who is innocent and unaware of the fraud. The mortgage is recorded. Person "X" is able to get the loan money and disappears. What happens when "A" then discovers the fraudulent mortgage?

The outcomes follow the same pattern as the first example of the transfer above and they emphasize the financial loss that people can suffer as a result of problems with recording rights.

In the systems where the owner "A" is protected, the lender "D" suffers financial loss as a result of the fraud. (While the system of Spain is declaratory for transfers, it is constitutive with regard to mortgages as they require the act of recording in order to exist).

In contrast, in title systems with immediate indefeasibility, the lender "D" has a legal claim against the owner "A", and a mortgage debt now encumbers the parcel of "A" even though "A" did not sign the mortgage agreement. The owner "A" has to pay the value of the loan to "D", even though "A" did not receive the money.

These outcomes are illustrated below:

TYPE OF SYSTEM	CONSTITUTIVE	DECLARATORY
Conclusive ("title systems")	Australia, England and Wales: "D" has a valid right Germany, Spain: "D" does not have a valid right	Denmark, Finland, Sweden: "D" does not have a valid right
Evidentiary ("deeds systems")	the Netherlands: "D" does not have a valid right	France, the united States of America: "D" does not have a valid right

Compensation

In deeds systems, for the examples above, the owner "A" is protected and the buyer "B" or the lender "D" suffers the loss. The registry or a public fund does not pay compensation to the person who loses as a result of a transaction. However, buyers may be able to pursue claims against professionals who were involved with preparing the transaction or against their title insurance policies. (Here, it is assumed that the person "X" who committed the fraud has no money or has disappeared).

The title systems of Germany and Spain protect the owner "A" during the period in which indefeasibility is deferred and do not provide state compensation to people such as the buyer

"B" or the lender "D" who suffer loss. In this manner, they resemble the deeds systems.

The title systems of Denmark, Finland and Sweden protect the owner "A" and provide state compensation to the buyer "B" or the lender "D", although certain conditions will apply, such as that the lender "D" has carried out a thorough risk assessment of the borrower.

For the title systems of Australia and England and Wales in the United Kingdom of Great Britain and Northern Ireland, the rule of immediate indefeasibility results in the owner "A" suffering a loss: in the example of a transfer, "B" is now the owner; and with the mortgage, the lender "D" has a legal claim for the repayment of a loan. These systems provide compensation to the owner "A" for the loss but even here there can be considerable differences. For example, in some states, the compensation fund is a last resort: before claiming compensation from the state the person who suffered the loss must try to be compensated by the person responsible for the loss, such as by suing the fraudster ("X") or demonstrating that it was not possible to do so.

These differences are illustrated below.

TYPE OF SYSTEM	CONSTITUTIVE	DECLARATORY
Conclusive ("title systems")	Australia, England and Wales: "B" gets the ownership "A" gets state compensation Germany: "A" gets the ownership "B" gets no state compensation	Denmark, Finland, Sweden: "A" gets the ownership "B" gets state compensation Spain: "A" gets the ownership "B" gets no state compensation
Evidentiary ("deeds systems")	the Netherlands: "A" gets the ownership "B" gets no state compensation	France, the United States of America: "A" gets the ownership "B" gets no state compensation

Considerations for proposals for the design of a system

As the examples above show, there is a variety of systems and ways in which they operate and whom they protect. Deeds systems protect the original owner in the case of a fraudulent transfer as do some title systems, while other title systems protect the new buyer or lender. This variety suggests that no single set of rules is inherently correct and that others are wrong. Instead, the rules must be accepted by the society in which they are to be implemented.

Extensive debate of proposals for reform: A proposal for a system should not be presented as a simple technical matter. The design of the system will cause it to produce specific

outcomes in particular situations. Which outcomes are the most desirable? There are choices to be made, and the decision-making process should enable people who hold rights to decide what outcomes are the fairest in particular situations. The rules of the system should be developed to produce those outcomes. People should know the impact of any change in rules and agree with them.

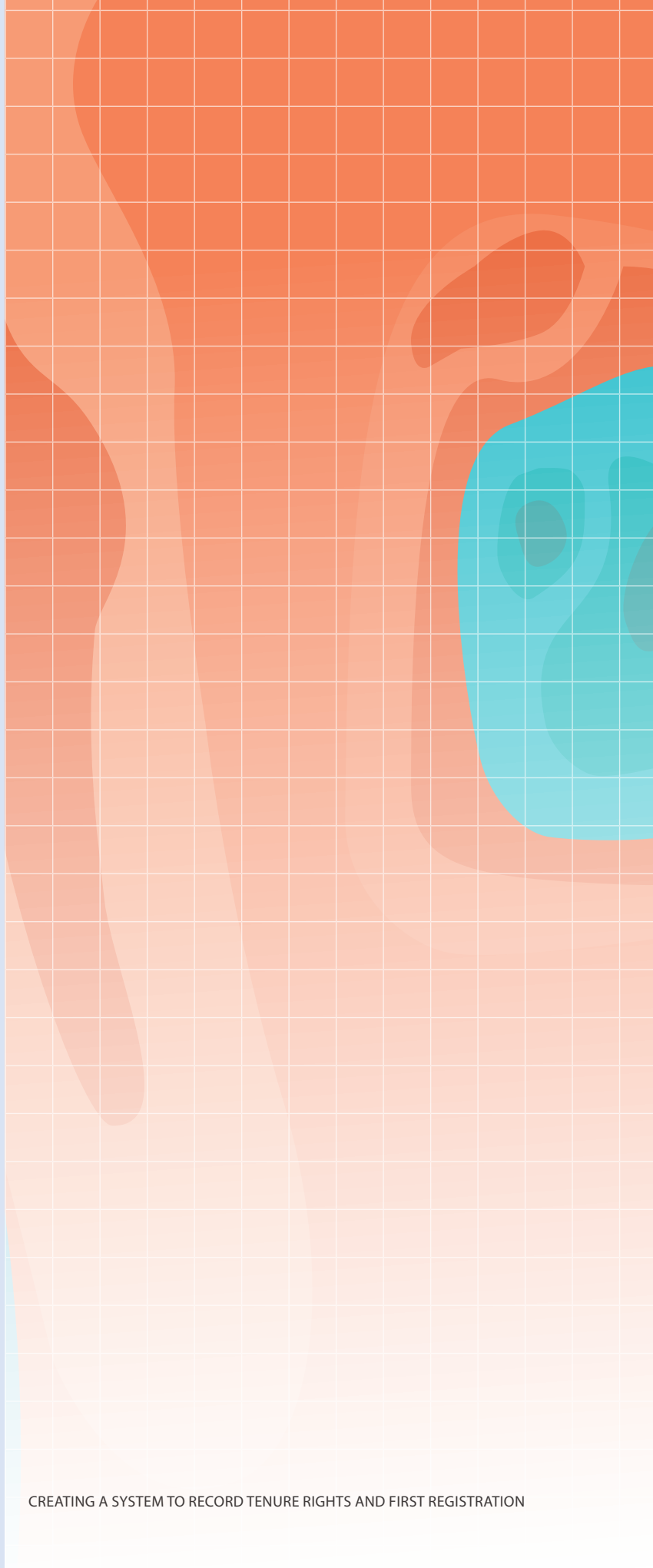
Adequate, sustainable and accessible compensation funds: The example of a fraudulent mortgage highlights that choices in the design can result in a financial loss to a person. In the case of a title system with immediate indefeasibility, the owner is required to pay the lender the loan amount even if the owner did not receive the money.

A proposal for a title system of immediate or deferred indefeasibility should include an adequate and sustainable way to compensate people who suffer a loss as a result of a change to the system.

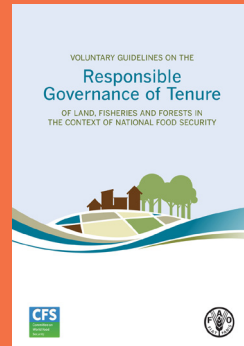
Compensation funds have been introduced in a number of states. A promise of compensation is good only if it is delivered, and it is unrealistic to assume that the need to pay compensation will arise only after sufficient funds have been collected through a fee on each transaction. Instead, a substantial initial amount needs to be committed when the fund is created, which can be maintained through small fees on each transaction (see the companion guide on [Improving ways to record tenure rights](#)). In addition, a compensation fund should not be a fund of last resort that pays compensation only after all the alternatives have been tried and have failed. A poor person who suffers a loss through a fraudulent mortgage should not have to pay the costs of initiating legal proceedings before a claim can be made for compensation.

A state guarantee, financed through the state budget, is an alternative to a compensation fund. Such a mechanism requires a stable and trustworthy governance structure, but where there is a well-functioning recording system, the amount of damages or compensation to be paid should not be large.

Compulsory professional liability insurance is another means of providing compensation where losses arise as a result of actions of professionals; for example, when drafting legally binding documents or when advising the parties in a transaction.



Voluntary Guidelines on Responsible Governance of Tenure



The purpose of these Voluntary Guidelines is to serve as a reference and to provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support

the progressive realization of the right to adequate food in the context of national food security.

These Guidelines are intended to contribute to the global and national efforts towards the eradication of hunger and poverty, based on the principles of sustainable development and with the recognition of the centrality of land to development by promoting secure tenure rights and equitable access to land, fisheries and forests.

The eradication of hunger and poverty, and the sustainable use of the environment, depend in large measure on how people, communities and others gain access to land, fisheries and forests. The livelihoods of many, particularly the rural poor, are based on secure and equitable access to and control over these resources. They are the source of food and shelter; the basis for social, cultural and religious practices; and a central factor in economic growth.

These Guidelines were endorsed by the CFS at its Thirty-eighth (Special) Session on 11 May 2012.



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The policy and legal frameworks set the environment in which a registry operates, as well as the broader tenure environment. This chapter focuses on the policy and legal aspects relating to the registry and its operations.

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6. POLICY AND LEGAL FRAMEWORKS

Key points of this chapter

- ◆ The constitution is often the foundation of tenure security.
- ◆ Where the constitution adopts the doctrine of separation of powers, care needs to be taken to define a registry's powers as administrative rather than judicial in nature.
- ◆ Tenure rights and tenure security cover a wide range of topics where good policies are important and the Guidelines provide a solid basis for such policies.
- ◆ Registries have a role to play in developing policies in their own areas of responsibility and in reflecting national policies in their operations. Registries also have a role in helping to develop national policies related to tenure rights and tenure security.
- ◆ The law, including the registry law, needs to address some fundamental aspects of registry operations, such as the creation of the system and the effect of recording, the processes of first and subsequent registration, and access to information.
- ◆ Other laws might need to be amended to reflect current good practice in tenure security and registry operations.
- ◆ By-laws, regulations and instructions also need to be in place to support registry operations and good practice.

THE CONSTITUTION AND THE REGISTRY

The basic document of rights and duties in any state is the constitution, and although it probably does not address the recording of rights, it is the basis for that function and can have an effect on it.

Generally, a constitution will include some statements relating to property, such as a guarantee of the right to own private property or that the state holds all land in trust for the people. A constitution is likely to include other general statements guaranteeing equality to all people and the right to equal treatment, including gender equality. Constitutions also often deal with expropriation (sometimes referred to as compulsory acquisition) and compensation, commonly stating that private property cannot be expropriated except for a valid public purpose, by due process of law and with provision of fair valuation and prompt payment of compensation.

The main issue concerning a registry that arises in a constitution is the separation of powers, under which the functions of the legislature, executive and judiciary are distinct and one branch of government cannot exercise the functions of another. Typically, for a registry, this means that the executive branch of government (the administration, which includes the registry) cannot exercise functions and powers of the judicial branch, such as making binding decisions on people's rights. In some states, including the United States of America, the doctrine of the separation of powers has been applied in such a way that all applications for first registration in the registry must be brought before the judiciary, on the basis that first registration is an act of investigating and determining rights. However, in most other states, there has either been no constitutional challenge to first registration by the registry or the process is regarded as simply administrative, in which the registry recognizes existing rights by recording them in a new system. Although the matter of separation of powers rarely arises, it is worth checking the constitution and keeping the possibility of a challenge in mind.

THE POLICY FRAMEWORK AND THE REGISTRY

The policy framework refers to the government's plans, objectives, positions and attitudes to various matters. It can result in decisions and programmes to implement those plans, including the establishment of a system to record rights and parcels.

Tenure rights and tenure security cover a wide range of areas, as the many topics included in the Guidelines show. These areas include such matters as:

- ◆ the nature of rights (e.g. ownership, usufruct and other use rights, leasehold), and how to acquire the rights;
- ◆ tenure reform, such as redistribution, restitution, consolidation or reallocation;
- ◆ recognition of all types of legitimate rights;
- ◆ building codes, building consent and permits, illegal developments and regularization or formalization, and housing policy;
- ◆ lending, access to finance and use of rights as collateral for loans;
- ◆ privacy and protection of personal information;
- ◆ open access to data;
- ◆ ICT and e-services of government;
- ◆ gender equality;
- ◆ customers and their engagement with government agencies;
- ◆ environmental safeguards and protection;
- ◆ anti-corruption; and
- ◆ taxation and valuation.

The registry has the lead role in developing policies regarding its own area of responsibility. This role covers both the development of policies for itself, particularly where they do not exist for the whole government, and the development of policy details to help achieve the policy outcomes that the government has set (such as on open access to data and privacy). Also, because the registry is often responsible for the registry law, it has the potential and even the obligation to develop policies and establish them in the law on topics relevant to its operations, such as gender equality and engagement with customers. Sections 6 and 17 of the Guidelines and this guide cover numerous areas in which policy decisions affecting a registry need to be made or developed, and many of these can be reflected in either formal policy statements (such as an anti-corruption declaration) by the registry in its implementation policies or by provisions in the law on registry.

Where the registry is not directly responsible for the development of certain policies, it may have to play an important role, such as with tenure reform, open access to data, ICT and e-services, gender equality and anti-corruption. The registry should, therefore, have a voice in the development of such policies. In undertaking this activity, the Guidelines provide a solid basis for reaching good decisions. Each section of the Guidelines can serve as the foundation for a policy, which can be further developed to suit the individual needs of a state. The registry should use the Guidelines to inform its thinking and assist the government by reference to these internationally accepted standards.

The continuing development and revision of the policy framework will require the registry to work closely with other government bodies (such as those responsible for public administration and the administration of other aspects of tenure, and with tax authorities and local governments) to ensure that the connection between tenure rights, information on those rights and the users of that information are properly addressed. The responsibilities for recording tenure rights will need to be clearly identified and linkages (including unique parcel identifiers) will be required to allow users to take advantage of information on the tenure rights to parcels, and on the value and use of those parcels.

THE REGISTRY LAW

The legal framework is a cornerstone of the recording of rights because the documents and transactions have an important legal effect. The recording process itself legally recognizes that a particular person holds certain rights either by presumption or conclusively. Laws must, therefore, be a starting point in the recording of rights.

Laws for registries do not exist in a vacuum. They are created in the context of many other laws that need to be considered. In common law states, the registry law exists in a wider context of judge-made law, and in civil law states, the civil code, land or property code, and administrative code will have impacts on a registry law. As a registry law fits within the context of the constitution, codes and other laws of general application, if there is any inconsistency with what the registry law should say, then these codes and other laws might need to be amended to support and provide consistency with the registry law.

In general, there are a number of key matters that need to be covered in the law for a registry to have an adequate legal basis to operate, provide services and serve its customers. These matters are listed as follows and they should reflect the matters discussed in this guide on ways to improve the recording of rights and service to customers. For example:

- ◆ the creation of the registry and the recording system: creation or designation of an authority to administer the system (see [Institutional arrangements](#) in chapter 5);
- ◆ the basis of the recording system: the best approach is to base the system on the parcel and not on the owner (see [Organization of the records around parcels](#) in chapter 5);
- ◆ first and subsequent registration: the powers and obligations of officials, right holders and others,

and the main elements of the process (see [Reducing the risk of failure of first registration](#) and [Systematic registration](#) in chapter 4);

- ◆ the effect of recording: What does it add? What is its effect on the parties and on third parties? What is its effect on boundaries and areas of parcels? (See [Choosing the way in which the system will operate](#) and [Choices in the design of outcomes](#) in chapter 5);
- ◆ provisions to protect people with disabilities, children and women who hold rights (see [Right holders](#) in chapter 3);
- ◆ access to information for the public balanced against privacy concerns (see [Public access and privacy](#) in chapter 5);
- ◆ powers to make regulations and guidelines, and powers to set fees (as follows).

Other key matters include appeal rights and the power to correct mistakes. These are covered in the companion guide on [Improving ways to record tenure rights](#).

These matters can all be addressed in the registry law or, as is more common, addressed mainly in that law and then supported by provisions in other laws. For example, the civil code might set out the basic aspects and effects of recording; a law on state fees might regulate payments for services and information; a law on surveying might regulate how surveyors subdivide parcels; and a law on appeals or complaints might regulate how customers who are dissatisfied with decisions can apply for them to be reconsidered. In some states, the processes of first registration are addressed in a separate law, but this does not have a great impact as long as it clearly relates to the registry law and there is a means to have the results of first registration incorporated in the recording system. Other relevant laws include those on freedom of information and privacy. Regulations are also important (see [By-laws and regulations, orders and decisions, and instructions](#) in this chapter).

Other related laws, which are not normally reflected in the registry law but which are important to operations concern gender equity and non-discrimination, workplace health and safety, taxation, accounting and its standards, and the status and conditions of government employees. Laws of more general application include laws on divorce, inheritance, companies, bankruptcy, expropriation, housing, leasing, redistributive reforms such as land reforms, valuation and e-signature. There are often laws dealing with the rights and capacity of children and people with disabilities.

An assessment of the registry law and others laws should be carried out to see how they match up with the standards specified in the Guidelines and covered in this guide. In this way, gaps and inconsistencies can be identified, and amendments or even new laws can be prepared to improve the legal framework.

BY-LAWS AND REGULATIONS, ORDERS AND DECISIONS, AND INSTRUCTIONS

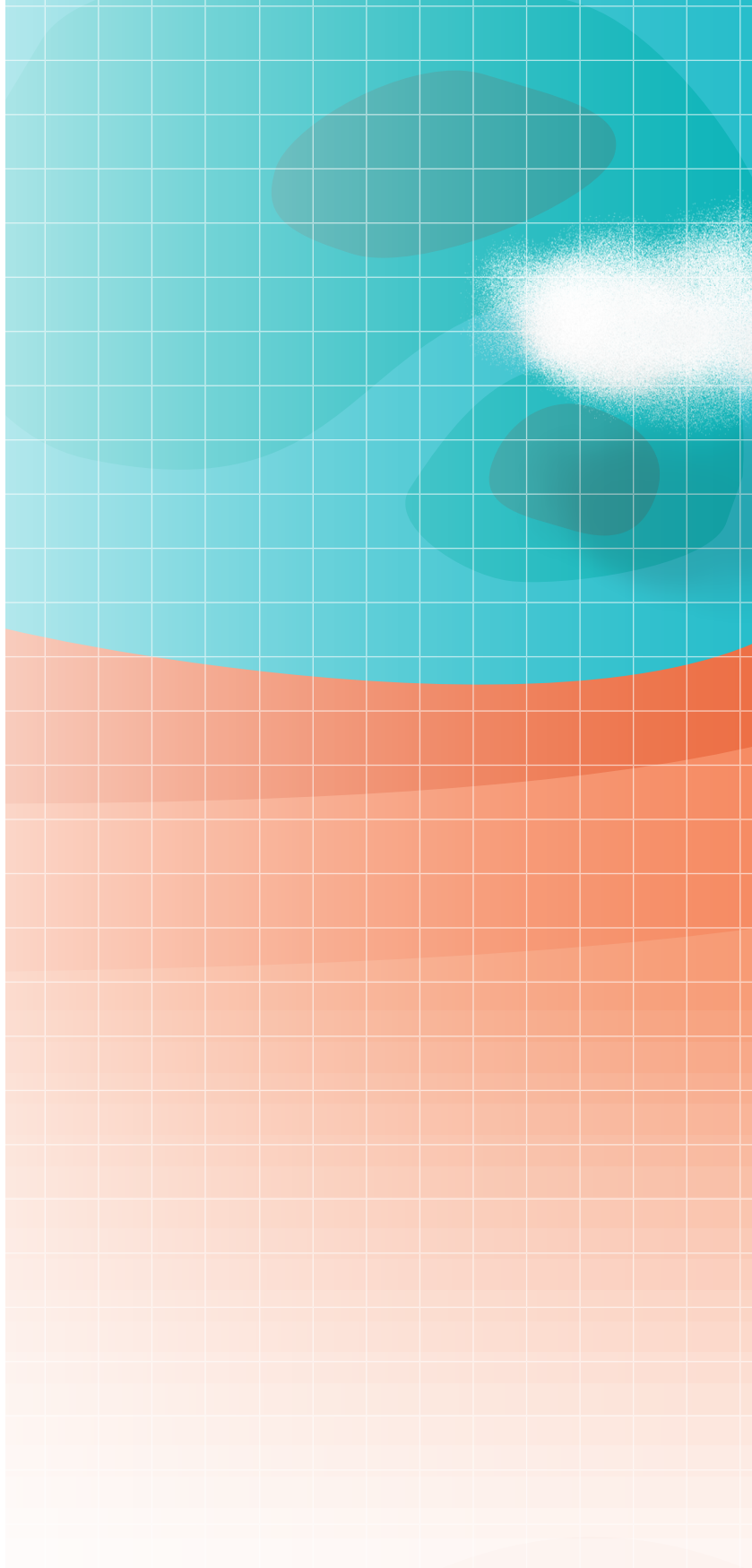
One or more regulations under the law on the registry will usually be issued to regulate more detailed matters of the processes for recording rights. Such regulations could provide information on the requirements for preparing documents, the fees to be charged for information and services, standard forms to be used, requirements for documents in foreign languages, how documents are to be presented (in paper and/or electronic form, and ensuring space for recording the names of spouses, etc.), how claims for compensation can be made, and other matters that are important but not addressed in the main law. These, too, need to be regularly reviewed and updated to make sure they comply with good customer services and current technology.

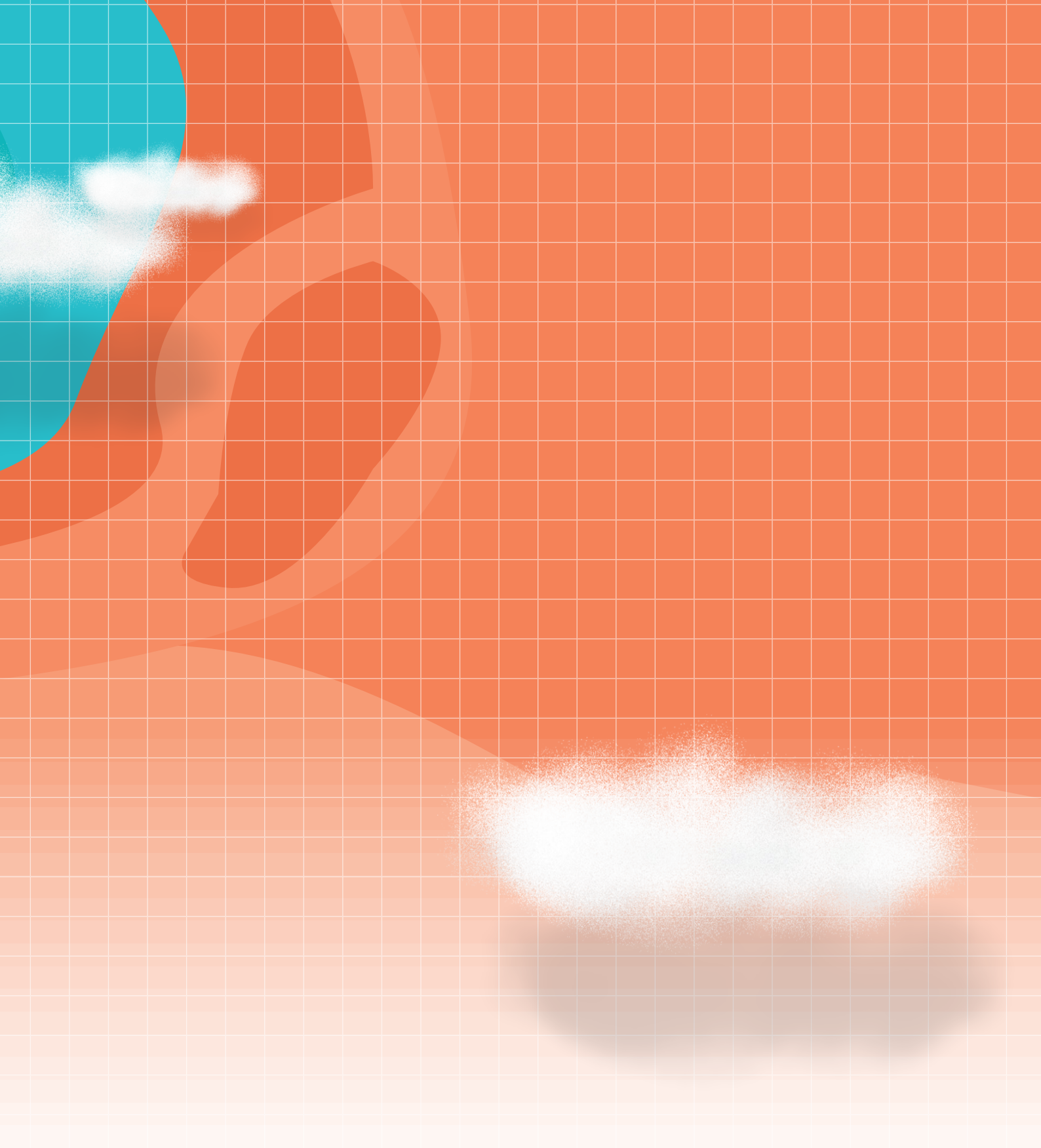
Orders and decisions usually cover day-to-day matters that cannot be addressed in the registry law, such as appointments of senior officials and other administrative matters. Depending on how the registry law is drafted, orders and decisions can be issued by the government, the minister responsible for the registry or the chief registrar. Orders and decisions will be typically used to define where and when first registration will start, and which geographic parts of the state are subject to the registry law (particularly important where a new system is being rolled out).

Another aspect of the legal framework in some states is the instructions issued by the chief registrar. These are usually technical instructions on how documents need to be prepared, what supporting documents need to be provided (if any), additional information required, the size, weight and quality of paper, security features, etc. They cover the detailed requirements for running the registry and are issued as the need arises. Often the law provides that the orders and instructions must be followed and that a failure to comply with the requirements will result in rejection. Importantly, there should also be a power for the registry to waive its own technical requirements in exceptional circumstances.

ADDITIONAL INFORMATION

FAO. 2016. *Responsible governance of tenure and the law: a technical guide for lawyers and other legal service providers.* (available at www.fao.org/3/a-i5449e.pdf).





The preceding chapters have presented well-established practices for creating a system for recording rights and for first registration, and these practices can be expected to continue to be relevant in the future. This concluding chapter considers some developments that are already underway or are just beginning to be implemented, but which will have an impact on the recording of rights in the future (see also the future considerations presented in the companion guide on [*Improving ways to record tenure rights*](#)).

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7. FUTURE CONSIDERATIONS

Key points of this chapter

- ◆ The practices for creating a system for recording rights and for first registration described in this guide have been used in many states around the world and it can be expected that these practices will continue to be relevant in the future.
- ◆ There will be a continuing and increasing interest in recording rights that have not typically been recorded in the past, such as customary rights, fisheries rights, forest rights and water rights.
- ◆ Technological innovations will allow recording systems to be introduced more quickly, with greater levels of detail and information as well as wider access.
- ◆ Costs will be reduced and systems will be more accessible through creative use of technology.
- ◆ Numerous options already exist for improving the process of collecting tenure information, particularly using smart phones, which also allow for a more participatory approach to be adopted.
- ◆ Rights that have never been recorded are likely to be recognized, and systems to collect and maintain such records are likely to be kept at the local level.

GENERAL CONSIDERATIONS

What will the next ten years bring? The details are difficult to predict but a general expectation is that recording systems will be created so they have greater relevance to people who are not currently benefiting from them. There will be a continuing and increasing interest in recording rights that have not typically been recorded in the past, such as customary rights, fisheries rights, forest rights and water rights.

While many people still do not have access to the Internet, several large technology companies have developed visions of affordable basic Internet services to be available around the world through the use of technologies such as satellites and Remotely Piloted Aircraft Systems (or drones), and the use of unused broadcasting frequencies allocated for television transmission. Any rapid advances in connecting people to the Internet, particularly in remote rural areas, will revolutionize how registries operate, including with regard to recording tenure rights of indigenous peoples and other communities with customary tenure systems and in informal settlements. Increased access to the Internet will allow for new systems to be introduced more quickly and services to be provided more rapidly.

While using the Internet allows for easier and quicker access to information, the risks to privacy become greater. A paper-based system limits the extent to which someone can search for information. With electronic records of tenure rights and the ability to search using computers, complete sets of records can be interrogated in a matter of minutes. States will have to consider how much information on tenure rights and their holders is collected and how much is made public, bearing in mind the competing objectives of quick and easy access to information versus the privacy entitlements of people. If laws on privacy do not already exist, then they will have to be considered, and people will need to have means of protecting their privacy, such as having the right to “opt out” of public access to their information. The inherent conflict between the principles of privacy and free access to tenure information is not easy to resolve, and different states will come up with different solutions depending on where they set the balance, but all states need to have the debate.

INTRODUCING NEW SYSTEMS AND SERVICES MORE QUICKLY

New systems can be introduced more quickly than previously. In five years, Rwanda adjudicated and recorded over ten million parcels and issued over eight million certificates. Almost all the transition states of Central and Eastern Europe built recording systems

from scratch for the newly privatized or restituted parcels and rights. In 15 years, the Russian Federation went from simple experiments to link information on parcels, rights and buildings that were held in incomplete and separate databases, which were operated by different agencies, to creating the largest integrated land registration system in the world, with the provision of online services from anywhere in the state.

The experiences of improving existing systems can also be used to help speed the design and implementation of new systems. For example, the cadastre in Spain went from having only simple alphanumerical records to the inclusion of a geographic information system (GIS), that linked the attribute and parcel maps, and now provides a web service that is free, publicly available and fully integrated with Internet-based maps. And in the former Yugoslav Republic of Macedonia, in the space of a few years, the land registry has moved from a predominantly paper-based system to a fully digital one in which over 50 percent of transactions are being submitted online using digital signatures.

For government, more complete information on natural resources and the rights associated with those resources means that specialists are better able to manage the resources and deal with the people using or owning them. As information becomes available by computer, the cost of finding the information required to manage a resource effectively diminishes rapidly and the range of possibilities for managing the resource expands dramatically.

Quicker and easier access to both information and the means of transacting with regard to rights will result in an overall reduction in costs, allowing more people to benefit from the system. Reduced costs will not only include the financial costs, but also the time taken to investigate, enter into a transaction and then record that transaction. Such efficiencies will facilitate lending, particularly short-term, microlending that can help the poor and vulnerable. In turn, productivity and food security should improve. In Kyrgyzstan, for example, the registration of rights permitted farmers to borrow money at a low cost for a few months to buy seed and fertilizer. Once the harvest was in, they repaid the loans. When asked what he would have done without this short-term loan facility, one farmer said that the land would have been left uncultivated.

COLLECTING INFORMATION FOR RECORDING RIGHTS IN NEW WAYS

New information is likely to be added to recording systems and in new ways. The provision of legal recognition of customary tenure should result in the increased recording of customary rights, whether in new systems or expanded versions of existing systems.

The recording of fishery tenure rights, forest tenure rights and water tenure rights are also likely to receive more attention. Multi-dimensional information on rights can be expected to become more important, as information on height and time is added to the tenure records. The addition of extra dimensions is sometimes referred to as the 3D cadastre with the inclusion of height.

The collection of information in the field is likely to be significantly affected by the improving capability of mobile phones as they become increasingly integrated with GNSSs such as GPSs, and have microphones and digital cameras with video capabilities, all driven by simple user interfaces of apps. This facility provides citizens with the opportunity to participate directly in processes for the administration of tenure, from accessing information services and recording parcel boundaries through to secure payment of fees using mobile banking. Evidence of rights can be recorded with smart phones and tablets using a variety of techniques, including:

- ◆ marked-up paper maps digitally photographed with a phone;
- ◆ a textual description of the boundaries recorded on a phone;
- ◆ a verbal description recorded on a phone;
- ◆ geotagged digital photographs of the parcel recorded on a phone;
- ◆ a video and commentary recorded on a phone, which could include contributions from neighbours as a form of verification;
- ◆ digital images created for existing paper certificates;
- ◆ information about the citizen/community and associated rights entered using forms;
- ◆ the positions of visual boundaries identified and traced on high resolution imagery (e.g. satellite, aerial, unmanned aerial vehicles);
- ◆ the coordinates of the parcel corners recorded directly using the GNSS capability of a phone. The positional uncertainty can be reduced using devices such as compact receivers that deliver GNSS positions of 0.5 m in real-time without the need for post-processing where signal enhancement is available;
- ◆ data stored in cloud-based management systems.

A trend over the past few decades has been to make systematic registration significantly more participatory, with the active involvement of communities and not only individual right holders. Community members become fully engaged in capturing, reviewing and confirming the rights within their community. The new technologies that can be used with crowd-sourced and community-based collection of information will help

to reinforce these participatory processes for gathering evidence of rights and engaging communities in reviewing and agreeing with the results. Greater use can be made of paralegals and parasurveyors in first registration processes to collect the evidence of rights on behalf of communities and citizens.

RECORDING RIGHTS THAT HAVE NOT BEEN LEGALLY RECOGNIZED

This guide is on the recording of legitimate tenure rights that have already been granted recognition under formal law and does not cover the recording of rights that are not legally recognized. This is because registry staff must have certainty in knowing what to record and what should not be recorded.

However, at this point of the guide there is a small deviation to address the recording of rights that are not legally recognized. Paragraph 4.4 of the Guidelines calls for states to provide legal recognition for legitimate rights not currently protected by law and to provide a process for determining the categories of rights that should be considered legitimate. Where such a process has not taken place in a state and people are concerned about losing what they consider to be their legitimate rights to their land and other natural resources, there is often an interest in identifying their claims outside the formal system for the administration of tenure. Some communities, including those of indigenous peoples who are being supported by NGOs and foundations, have created platforms to manage and publicize rights that are identified and recorded by the communities using crowd-sourced, participatory approaches along with the services of paralegals and parasurveyors.

These unofficial records on crowd-sourced and community-recorded rights could serve as valuable sources of evidence when such rights are given legal recognition and are included within the formal administration of tenure.

ADDITIONAL INFORMATION

FIG (International Federation of Surveyors)/World Bank. 2014. *Fit-for-purpose land administration*. FIG publication No. 60. (available at www.fig.net/resources/publications/figpub/pub60/Figpub60.pdf).

This guide is based on the specific and general provisions of the Guidelines on recording systems for rights and parcels. This annex highlights relevant areas of the Guidelines. It is intended to assist in reading the Guidelines and is not a substitute for them.

ANNEX: WHAT DO THE GUIDELINES SAY ABOUT THE RECORDING OF RIGHTS?

The main text of the Guidelines on recording rights and parcels is in section 17, which is in Part 5 on the administration of tenure. Section 17 should be read with other parts of the Guidelines, outlined as follows.

Section 1 of the Guidelines gives their objectives.

Paragraph 1.1	<ul style="list-style-type: none">◆ The Guidelines seek to improve governance of tenure of land, fisheries and forests.◆ They seek to improve the governance of tenure for the benefit of all, with an emphasis on vulnerable and marginalized people.◆ They seek to improve the governance of tenure with the goals of:<ul style="list-style-type: none">➢ food security and progressive realization of the right to adequate food;➢ poverty eradication;➢ sustainable livelihoods;➢ social stability;➢ housing security;➢ rural development;➢ environmental protection;➢ sustainable social and economic development.◆ All programmes, policies and technical assistance to improve governance of tenure should be consistent with existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments.
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With regard to improving governance of tenure through recording rights and parcels, section 17 has five paragraphs, key points of which are shown in the following table:

Paragraph 17.1	<ul style="list-style-type: none">◆ States should provide recording systems to improve tenure security and the functioning of local societies and markets.◆ The recording systems should be able to record individual and collective tenure rights that are held by the state and public sector, private sector, and indigenous peoples and other communities with customary tenure.◆ The systems should record, maintain and publicize tenure rights and duties, the people who hold them, and the parcels or holdings to which the tenure rights relate.
Paragraph 17.2	<ul style="list-style-type: none">◆ The systems should be appropriate for the particular circumstances, including the human and financial resources available.◆ Tenure rights of indigenous peoples and other communities with customary tenure should be recorded in a socio-culturally appropriate way.

Paragraph 17.2	<ul style="list-style-type: none"> ◆ To ensure transparency and compatibility with other sources of information, recording systems should be included with other spatial information systems in an integrated framework. ◆ The system should allow for the integration of records of all tenure rights, whether they are held by the state and public sector, private sector, and indigenous peoples and other communities with customary tenure. ◆ Where it is not possible to record tenure rights of indigenous peoples and other communities with customary tenure, or occupations in informal settlements, care should be taken to prevent the recording of competing rights in those areas.
Paragraph 17.3	<ul style="list-style-type: none"> ◆ Everyone should be able to record their tenure rights without discrimination. ◆ Where appropriate, agencies should provide service centres or mobile offices to improve access, especially with regard to vulnerable groups. ◆ Locally-based professionals, such as lawyers, notaries, surveyors and social scientists, should be considered to help deliver information on tenure rights to the public.
Paragraph 17.4	<ul style="list-style-type: none"> ◆ Procedures should be simplified and locally-suitable technology should be used to reduce the time and costs for delivering services. ◆ The spatial accuracy for parcels and other spatial units should be sufficient to meet local needs and, if required, could be improved over time. ◆ Information on the tenure rights, the holder of the rights and the spatial units should be linked. ◆ Records should be indexed by spatial units, as well as by holders, to allow competing rights to be identified. ◆ Records of tenure rights should be shared to allow state agencies and local governments to improve their services. ◆ Information should be shared in accordance with national standards and should include disaggregated data on tenure rights.
Paragraph 17.5	<ul style="list-style-type: none"> ◆ Information on tenure rights should be easily available to all. ◆ The sharing of information on tenure rights should be subject to privacy restrictions, but these restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions. ◆ Corruption should be prevented by publicizing the processes, requirements, fees and any exemptions, and deadlines for responses to requests for services.

Section 7 is on safeguards that should be applied where tenure rights are being allocated or recognized for the first time. It addresses the creation of records, i.e. first registration:

Paragraph 7.1	<ul style="list-style-type: none"> ◆ When states recognize or allocate tenure rights, they should establish safeguards to avoid infringing or extinguishing tenure rights of others, including legitimate tenure rights that are not currently protected by law. ◆ Safeguards should protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights.
Paragraph 7.3	<ul style="list-style-type: none"> ◆ Where states intend to recognize or allocate tenure rights, they should first identify all existing tenure rights and right holders, whether recorded or not. ◆ Indigenous peoples and other communities with customary tenure, smallholders and anyone else who could be affected should be included in the consultation process (consistent with paragraph 9.9 for indigenous peoples and principle 3B.6 for other communities). ◆ States should provide access to justice if people believe their tenure rights are not recognized.
Paragraph 7.4	<ul style="list-style-type: none"> ◆ States should ensure that women and men enjoy the same rights in the newly recognized tenure rights, and that those rights are reflected in the records. ◆ Where possible, legal recognition and allocation of tenure rights should be done systematically, progressing area by area, in order to provide the poor and vulnerable with full opportunities to acquire legal recognition of their tenure rights. ◆ Legal support should be provided, particularly to the poor and vulnerable. ◆ Locally appropriate approaches should be used to increase transparency when records of tenure rights are initially created, including in the mapping of tenure rights.

Section 9 includes some aspects with regard to indigenous peoples and other communities with customary tenure systems.

Paragraph 9.4	<ul style="list-style-type: none"> ◆ Legitimate tenure rights of indigenous peoples and other communities should be provided by states. ◆ The recognition should take into account the land, fisheries and forests that are: <ul style="list-style-type: none"> ➢ used exclusively by a community; ➢ shared by different communities.
Paragraph 9.5	<ul style="list-style-type: none"> ◆ States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. ◆ Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.
Paragraph 9.8	<ul style="list-style-type: none"> ◆ States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others. ◆ Where a community does not object, States should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community. ◆ Where tenure rights of indigenous peoples and other communities with customary tenure systems are formally documented, they should be recorded with other public, private and communal tenure rights to prevent competing claims.
Paragraph 9.11	<ul style="list-style-type: none"> ◆ States should respect and promote customary approaches used by indigenous peoples and other communities with customary tenure systems to resolve tenure conflicts within communities. This support should be provided in a way that is consistent with the existing obligations of states under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. ◆ For land, fisheries and forests that are used by more than one community, means of resolving conflict between communities should be strengthened or developed.

Section 8 on public land, fisheries and forests also has some relevant paragraphs:

Paragraph 8.3	<ul style="list-style-type: none"> ◆ There are publicly-owned land, fisheries and forests that are collectively used and managed (sometimes referred to as commons). ◆ States should recognize and protect such publicly-owned land, fisheries and forests and their related systems of collective use and management, including in processes of allocation by the State.
Paragraph 8.4	<ul style="list-style-type: none"> ◆ States should strive to establish up-to-date tenure information on land, fisheries and forests that they own or control by creating and maintaining accessible inventories. ◆ Such inventories should record the agencies responsible for administration as well as any legitimate tenure rights held by indigenous peoples and other communities with customary tenure systems and the private sector. ◆ Where possible, States should ensure that the publicly-held tenure rights are recorded together with tenure rights of indigenous peoples and other communities with customary tenure systems and the private sector in a single recording system, or are linked to them by a common framework.
Paragraph 8.5	<ul style="list-style-type: none"> ◆ States should determine which of the land, fisheries and forests they own or control will be retained and used by the public sector, and which of these will be allocated for use by others and under what conditions.
Paragraph 8.9	<ul style="list-style-type: none"> ◆ States should allocate tenure rights and delegate tenure governance in transparent, participatory ways, using simple procedures that are clear, accessible and understandable to all, especially to indigenous peoples and other communities with customary tenure systems. ◆ Information in applicable languages should be provided to all potential participants, including through gender-sensitive messages. ◆ Where possible, States should ensure that newly allocated tenure rights are recorded with other tenure rights in a single recording system or are linked by a common framework. ◆ States and non-state actors should endeavour to prevent corruption in the allocation of tenure rights.

Section 10 addresses informal rights.

Paragraph 10.1	<ul style="list-style-type: none"> ◆ Where informal tenure exists, states should acknowledge it in a manner that respects existing formal rights under national law and in ways that recognize the reality of the situation and promote social, economic and environmental well-being. ◆ States should promote policies and laws to provide recognition to such informal tenure. ◆ The process of establishing these policies and laws should be participatory, gender sensitive and strive to make provision for technical and legal support to affected communities and individuals. ◆ States should acknowledge the emergence of informal tenure arising from large-scale migrations.
Paragraph 10.3	<ul style="list-style-type: none"> ◆ Whenever states provide legal recognition to informal tenure, this should be done through participatory, gender-sensitive processes, having particular regard to tenants. ◆ These processes should facilitate access to legalization services and minimize costs. ◆ States should strive to provide technical and legal support to communities and participants.
Paragraph 10.4	<ul style="list-style-type: none"> ◆ States should take measures to limit the informal tenure that results from overly complex legal and administrative requirements for land use change and development on land. ◆ Development requirements and processes should be clear, simple and affordable to reduce the burden of compliance.
Paragraph 10.6	<ul style="list-style-type: none"> ◆ Where it is not possible to provide legal recognition to informal tenure, states should prevent forced evictions that violate existing obligations under national and international law.

Section 21 also has some relevant material on the resolution of disputes over rights and parcels.

Paragraph 21.1	<ul style="list-style-type: none"> ◆ States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights. ◆ Access should also be provided to alternative means of resolving disputes. ◆ States should provide effective remedies for disputes and a right to appeal, and the remedies should be promptly enforced. ◆ Mechanisms should be available to all to avoid or resolve potential disputes at the preliminary stage, either within the implementing agency or externally. ◆ Dispute-resolution services should be accessible to all women and men in terms of location, language and procedures.
Paragraph 21.2	<ul style="list-style-type: none"> ◆ States may consider: <ul style="list-style-type: none"> ➢ introducing specialized tribunals or bodies that deal solely with disputes over tenure rights; ➢ creating expert positions within the judicial authorities to deal with technical matters; ➢ having special tribunals to deal with disputes over regulated spatial planning, surveys and valuation.
Paragraph 21.3	<ul style="list-style-type: none"> ◆ States should strengthen and develop alternative forms of dispute resolution, especially at the local level. ◆ Where customary or other established forms of dispute settlement exist they should provide for fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights.
Paragraph 21.4	<ul style="list-style-type: none"> ◆ States may consider using implementing agencies to resolve disputes within their technical expertise, such as those responsible for surveying to resolve boundary disputes between individual parcels within national contexts. ◆ Decisions should be delivered in writing and based on objective reasoning, and there should be a right to appeal to the judicial authorities.
Paragraph 21.5	<ul style="list-style-type: none"> ◆ States should endeavour to prevent corruption in dispute-resolution processes.
Paragraph 21.6	<ul style="list-style-type: none"> ◆ In providing dispute-resolution mechanisms, States should strive to provide legal assistance to vulnerable and marginalized people to ensure safe access for all to justice without discrimination. ◆ Judicial authorities and other bodies should ensure that their staff have the necessary skills and competencies to provide such services.

In particular, section 17 (and other sections) should be read with section 6, which is concerned with the delivery of services.

Paragraph 6.1	<ul style="list-style-type: none"> ◆ To the extent that resources permit, agencies and judicial authorities should have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner. ◆ Staff at all levels should receive continuous training. ◆ Staff should be recruited with due regard to ensuring gender and social equality.
Paragraph 6.2	<ul style="list-style-type: none"> ◆ The delivery of services should be consistent with a state's existing obligations under national and international law, and its voluntary commitments under regional and international instruments.
Paragraph 6.3	<ul style="list-style-type: none"> ◆ Services should be prompt, accessible and non-discriminatory. ◆ Unnecessary legal and procedural requirements should be eliminated. ◆ The services of agencies and judicial authorities should be reviewed and improved, as required, by the state.
Paragraph 6.4	<ul style="list-style-type: none"> ◆ Agencies and judicial authorities should serve the entire population, delivering services to all, including those in remote locations. ◆ Services should be prompt and efficient, using locally suitable technology to increase efficiency and accessibility. ◆ Internal guidelines should be developed so that staff can implement policies and laws in a reliable and consistent manner. ◆ Procedures should be simplified without threatening tenure security or quality of justice. ◆ Explanatory materials should be widely publicized in applicable languages to inform people of their rights and responsibilities.
Paragraph 6.5	<ul style="list-style-type: none"> ◆ Policies and laws should promote the appropriate sharing of information on tenure rights, for the effective use by all. ◆ National standard should be developed for the shared use of information, taking into account regional and international standards.
Paragraph 6.6	<ul style="list-style-type: none"> ◆ Additional measures should be considered to support vulnerable or marginalized groups who could not otherwise access the services. ◆ These measures should include legal support, such as legal aid, and may also include the provision of services by paralegals or parasurveyors, and mobile services for remote communities and mobile, indigenous peoples.
Paragraph 6.7	<ul style="list-style-type: none"> ◆ Agencies and judicial authorities should foster a culture based on service and ethical behaviour. ◆ They should seek regular feedback, such as through surveys and focus groups, to raise standards and improve delivery of services to meet expectations and to satisfy new needs. ◆ They should publish performance standards and report regularly on results. ◆ Users should be able to have their complaints addressed within the agency (e.g. by administrative review) or externally (e.g. by an independent review or an ombudsman).
Paragraph 6.8	<ul style="list-style-type: none"> ◆ Relevant professional associations should develop, publicize and monitor the implementation of high levels of ethical behaviour. ◆ Those in the public and private sectors should adhere to applicable ethical standards and be subject to disciplinary action in case of violations. ◆ Where such associations do not exist, the state should provide an environment conducive to their establishment.
Paragraph 6.9	<ul style="list-style-type: none"> ◆ All should endeavour to prevent corruption. ◆ Anti-corruption measures should be adopted and enforced, including applying checks and balances, limiting the arbitrary use of power, addressing conflicts of interest and adopting clear rules and regulations. ◆ There should be provision for the administrative and/or judicial review of decisions of agencies. ◆ Staff working in agencies should be held accountable for their actions. ◆ At the same time, the staff should be provided with the means of conducting their duties effectively. ◆ And staff should be protected against interference in their duties and from retaliation for reporting acts of corruption.

As is the case elsewhere in the Guidelines, the principles of section 3 are mainstreamed in these sections.

General principles are provided in 3A:

General principles of the Guidelines

Paragraph 3.1 identifies actions to be taken by the state:

1. Recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.
2. Safeguard legitimate tenure rights against threats and infringements. They should protect tenure right holders against the arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.
3. Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.
4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.
5. Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavour to prevent corruption in all forms, at all levels and in all settings.

Paragraph 3.2 identifies a series of actions to be taken by non-state actors in the general context of the responsibility to respect human rights and legitimate tenure rights.

7. Rule of law: adopting a rules-based approach through laws that are widely publicized in applicable languages, are applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.
8. Transparency: clearly defining and widely publicizing policies, laws and procedures in applicable languages, and as well as any decisions in formats accessible to all.
9. Accountability: holding individuals, public agencies and non-state actors responsible for their actions and decisions according to the principles of the rule of law.
10. Continuous improvement: improving mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programmes and to secure ongoing improvements.

Principles of implementation are provided in 3B:

Principles of implementation of the Guidelines

1. Human dignity: recognizing the inherent dignity and the equal and inalienable human rights of all individuals.
2. Non-discrimination: recognizing that no one should be subject to discrimination under law and policies as well as in practice.
3. Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests for all women and men, youth, and vulnerable and traditionally marginalized people within the national context.
4. Gender equality: ensuring the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status.
5. Holistic and sustainable approach: recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration.
6. Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

Governance of tenure **technical guides**

FAO. 2013. *Governing land for women and men: a technical guide to support the achievement of responsible gender-equitable governance of land tenure.* Governance of tenure technical guide No. 1. Rome.

FAO. 2013. *Improving governance of forest tenure: a practical guide.* Governance of tenure technical guide No. 2. Rome.

FAO. 2014. *Respecting free, prior and informed consent: practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition.* Governance of tenure technical guide No. 3. Rome.

FAO. 2015. *Safeguarding land tenure rights in the context of agricultural investment: a technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, for government authorities involved in the promotion, approval and monitoring of agricultural investments.* Governance of tenure technical guide No. 4. Rome.

FAO. 2016. *Responsible governance of tenure and the law: a guide for lawyers and other legal service providers.* Governance of tenure technical guide No. 5. Rome.

FAO. 2016. *Improving governance of pastoral lands: implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.* Governance of tenure technical guide No. 6. Rome.

FAO. 2016. *Responsible governance of tenure: a technical guide for investors.* Governance of tenure technical guide No. 7. Rome.

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Recording tenure rights, such as through registration and cadastre systems, can be an important way to recognize and safeguard those rights. However, people are often unable to have their tenure rights recorded in a public recording system. This guide addresses the situations where the most appropriate approach is to create a new system to record those rights, and it provides practical advice on how rights can be recorded

for the first time. In doing so, it gives guidance on how tenure rights can be identified and recorded by applying the principles and practices of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*. This guide is accompanied by Governance of Tenure Technical Guide 10, which focuses on improving existing ways to record rights.

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